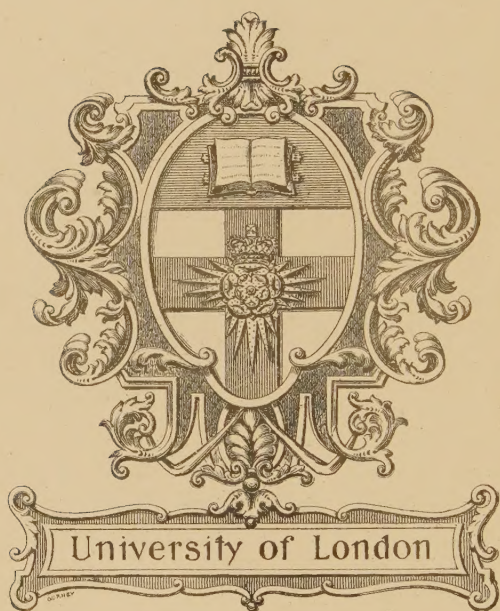


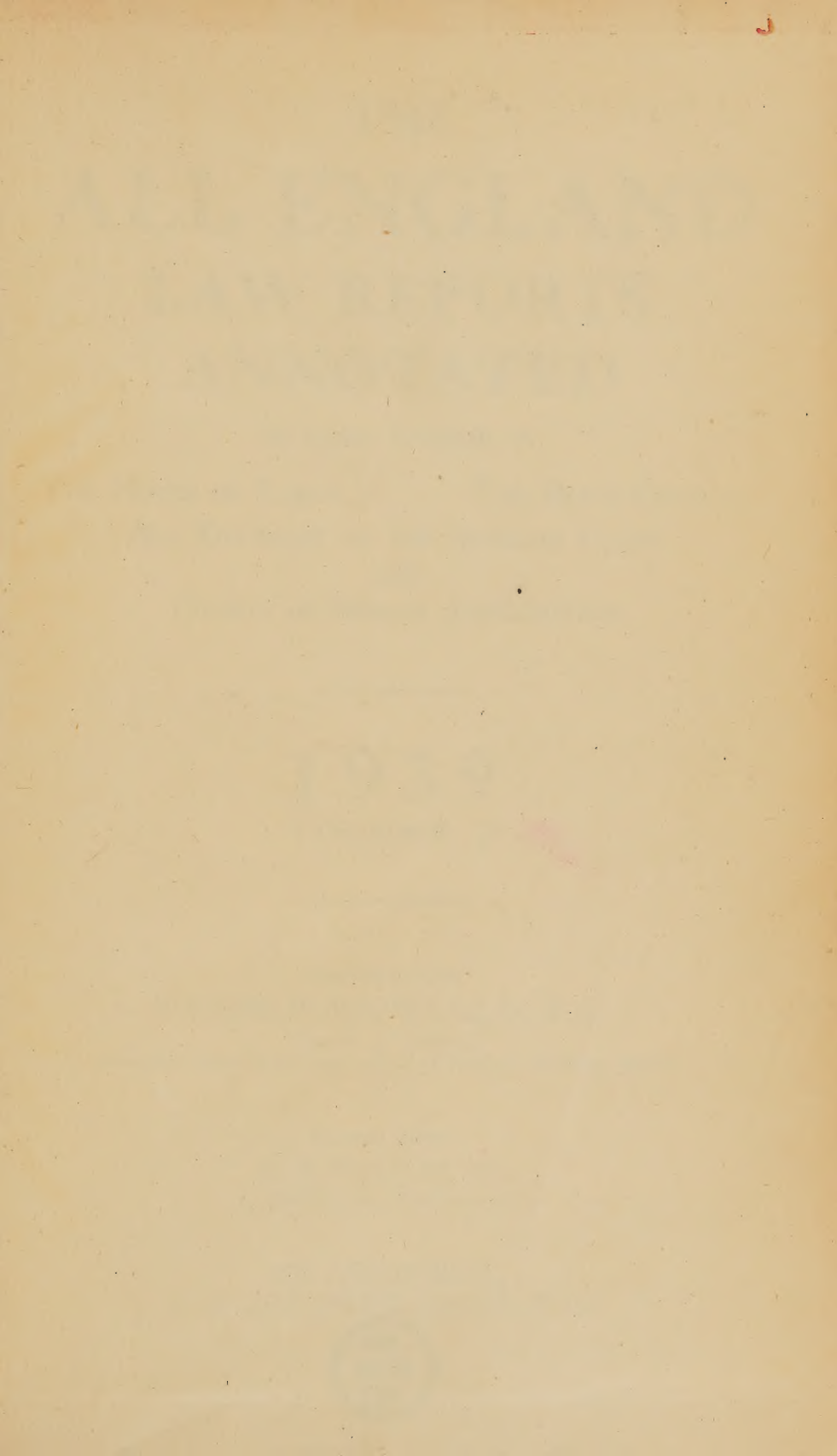
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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS THE PRIVY COUNCIL
ALL DIVISIONS OF THE SUPREME COURT
AND
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- P. 267. *Re SPITZEL'S WILL TRUSTS*, SPITZEL v. SPITZEL. Counsel for the third and fourth defendants was *B. G. Burnett-Hall*.
- P. 394. CLARK v. CLARK. *Woodcock*, *Ryland & Parker* were agents for *W. H. Lill & Co.*, Altrincham.
- Pp. 411, 412. STIMPSON v. GOSPORT OMNIBUS CO. *Hon. Sir Stafford Cripps, K.C.*, and *G. Granville Slack* were counsel for the employees, and *G. D. Squibb* was counsel for the Portsmouth Corporation. In this case for: "CASE STATED by an arbitrator" read "MOTION to set aside an award of an arbitrator."
- P. 719. DONOVAN v. NATIONAL AMALGAMATED APPROVED SOCIETY. At foot of page for "regulation of the Ministry of Health" read "circular issued by the Ministry of Health."
- P. 757. BAXTER v. F. W. GAPP & CO., LTD. At line C.3 for "at p. 838" read "at p. 839."

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THE ALL ENGLAND LAW REPORTS ANNOTATED

CLAYDON *v.* SIR LINDSAY PARKINSON, LTD.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.J.J.), **February 2, March 7, 1939.**]

Factories and Workshops—Contractor and subcontractor—Buildings—Building regulations—Scaffolding—Statutory duty as to safety—Upon which contractor statutory duty rests—Building Regulations, 1926 (S.R. & O., 1926, No. 738), regs. 13, 14.

The plaintiff, a workman, was employed by a firm of subcontractors, and, in the course of his employment, had to make use of scaffolding which had been erected by the principal contractor. While he was walking along the scaffolding, one of the planks broke under his weight. He fell to the ground, and was injured. At the trial in the county court, the plaintiff, suing the principal contractor in respect of his injuries, failed to prove any negligence. He thereupon relied upon a breach of statutory duty under the Building Regulations, 1926, contending that those regulations placed upon the principal contractor, who had erected the scaffolding, a duty to see that it was safe for those using it:—

HELD: the Building Regulations, 1926, do not impose such a duty upon the principal contractor, even though he has erected the scaffolding, but make it the duty of the man's own employer to see that the scaffolding is safe.

[EDITORIAL NOTE.] This case turns purely upon the construction of the Building Regulations, 1926. The action having been brought against the principal contractor, the only question that could be decided was whether the regulations imposed a duty upon that contractor to ensure the safety of the workman. It must be noted that the principal contractor had been responsible for the erection of the scaffolding. The regulations, however, place this duty, not upon the contractor erecting the scaffolding, but upon the employer of the workman. To succeed, therefore, upon a claim based on breach of statutory duty, the workman must sue his own employer.

AS TO BUILDING REGULATIONS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 619-622, paras. 1174, 1175; and FOR CASES, see DIGEST, Vol. 24, pp. 921-925, Nos. 152-180.]

Cases referred to:

- (1) *The Kite*, [1933] P. 154; Digest Supp.; 102 L.J.P. 101; 149 L.T. 498.
- (2) *Ballard v. North British Ry. Co.*, [1923] S.C. 43; 36 Digest 88, case 581 *vix*.
- (3) *Kearns v. Gee, Walker & Slater, Ltd.*, [1937] 1 K.B. 187; [1936] 3 All E.R. 151; Digest Supp.; 106 L.J.K.B. 16; 155 L.T. 519.
- (4) *Read v. Croydon Corpn.*, [1938] 4 All E.R. 631; Digest Supp.; 108 L.J.K.B. 72; 160 L.T. 176.

APPEAL by the plaintiff from an order of His Honour JUDGE DUMAS, sitting at the Westminster County Court, dated June 17, 1938. The facts are fully set out in the judgment of the court delivered by CLAUSON, L.J. The Building Regulations, 1926, regs. 13, 14, provide as follow :

13. Where a scaffold has not been erected by or under the superintendence of the employer whose workmen are to use it, the said employer, before allowing work to proceed thereon, and during such period as any person employed by him is engaged thereon, shall satisfy himself, either personally or by his agent, that the scaffolding is in a stable condition, and that the materials used in its construction are sound, and that the required safeguards are in position. A

14. Scaffolding in use shall be examined once a month by a competent person deputed by the employer responsible for the scaffolding . . . B

D. N. Pritt, K.C., M. Hughes and L. Maclaren for the appellant.

J. Alun Pugh and A. Ward for the respondents.

Pritt, K.C. : The regulations mean that it shall be the duty of the contractor and of the employer to observe the requirements of the Act designed to secure the safety of the workmen. In this case, the defendants themselves supplied the scaffolding, and it was their duty, imposed by the statutory regulations, to see that the scaffolding was in conformity with those regulations. A workman is at liberty to sue either the contractor or his immediate employer for a breach of the statutory duty imposed by the regulations. The Building Regulations, 1926, regs. 13, 14, impose on the plaintiff's employers a duty to see that the scaffolding is in order, but that does not absolve the defendants from their duty towards those who use it. C

Pugh : The "contractor" referred to is the contractor who employs the workman. The words "engaged by him" show that the duty is put on the immediate employer, and on no one else. [Counsel referred to *Kearns v. Gee, Walker & Slater, Ltd.* (3) and *Read v. Croydon Corpn.* (4).] D

CLAUSON, L.J. [delivering the judgment of the court] : This is an appeal from a judgment of His Honour JUDGE DUMAS, sitting at the Westminster County Court, giving judgment for the defendants in an action by the plaintiff, a workman employed by a firm of subcontractors, for damages for injuries sustained by him while working for the subcontractors on a site in Long Acre. The plaintiff chose to bring his action, not against the subcontractors, who were his employers, but against the head contractors for the buildings on the site, who had entered into a subcontract with a second firm for part of the work. That second firm had entered into a subcontract with a third firm for a portion of that part of their work. It was this third firm who were the plaintiff's employers. E

In the course of the work, the plaintiff had to walk, at a height of some 18 ft. above the ground, along certain scaffolding which he found on the premises, and which had been erected by the defendants. One of the planks, a long deal plank, broke under his weight, and he fell to the F

ground. At common law, he was, no doubt, the head contractor's invitee, and, as such, could sue the defendants in an action for negligence, if he could prove it. As the judge quite rightly says, he could find in favour of the plaintiff on common law grounds only if he were satisfied that the deal plank, when left in position on the premises, was of improper material, or, for some other reason, was unfit to be so left. Nothing can be made of the point that he decided as a matter of law that it "was not a case of *res ipsa loquitur*." It is unnecessary to decide, in the absence of explanation, whether or not what happened would have amounted to *prima facie* evidence of negligence, because evidence was given to explain the accident, and, having heard all the evidence, the judge was not satisfied that the plaintiff had made out his case : see *The Kite* (1), at pp. 169, 170, and the opinion of LORD DUNEDIN there cited from *Ballard v. North British Ry. Co.* (2). There is no error in point of law entitling us to interfere, so far as this branch of the claim is concerned.

Failing to establish negligence, the plaintiff rested his case on breach of statutory duty. It was said (and we will assume that it was said correctly) that the Building Regulations, 1926, applied to the premises by reason of the Factory and Workshop Act, 1901, ss. 79, 105 (1). It was then said that a duty towards the plaintiff was imposed on the defendants by the clause headed "Duties," which runs as follows :

It shall be the duty of every contractor and employer of workmen to observe such of the requirements in Part 1 of these regulations as affect any workman engaged by him.

Pausing there, it is to be observed that the duty is confined to the observance of such regulations as affect the employer's own workmen. Some argument was addressed to the court on the words "engaged by him," but we are quite unable, in such circumstances as those which appear in this case, to read those words as having reference to the plaintiff, who was employed, not by the defendants, but by someone else. Reg. 1 relates to the provision of suitable scaffolding plant, but is not addressed to the question of determining the person whose duty it is to provide it. That is covered by the sentence under the head of "Duties" which we have already quoted. The duty in respect of scaffolding plant is there laid upon the employer as a duty to his own workmen. The word "provided" is used, no doubt, in order to cover, not only the case of the employer who erects scaffolding for his own workmen, but also the common case of an employer who, being a subcontractor, "provides" scaffolding for his workmen by arranging with the head contractor for the use of scaffolding which the head contractor has erected or caused to be erected. Reference was made to reg. 4, but nothing seems to turn on it in the present case. Reg. 13 deals with the special case of an employer who is sending his workmen on to scaffolding with the erection of which he has had nothing to do, and imposes on him an express duty of care in regard to the fitness for use of such scaffolding. This exceptional provision fortifies our view that the safety of the workman is, under these

regulations, the concern of his own employer, and not the concern of the person, other than that employer, who erected the scaffolding. This view is still further emphasised by reg. 14, which puts on the "employer responsible for the scaffolding"—which we understand to mean, as regards responsibility to an individual workman, the employer who employs the workman and "provides" the scaffolding for him—the duty of periodically examining the scaffolding and making a proper record of the examination. A careful examination of the regulations, with the assistance of counsel, leads us to the same conclusion as that reached by the county court judge—namely, that the statutory duty is a duty owed by the employer to the workmen he employs. Whether or not the plaintiff has a case under the regulations against his own employer is a matter with which this case is not concerned. He has failed, in our view, as in the view of the county court judge, to make out any case under the regulations against the present defendants. The appeal will be dismissed, with costs.

Appeal dismissed, with costs.

Solicitors: *W. H. Thompson* (for the appellant); *Carpenters* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

Re THACKRAH, THACKRAH v. WILSON.

[CHANCERY DIVISION (Bennett, J.), **March 7, 8, 9, 1939.**]

Charities—Gift to non-existent association—Association without proper constitution or defined membership—Legacy not applicable for a purpose.

Charities—Charitable purposes—Advancement of religion—Oxford Group.

The testatrix bequeathed a sum of money, any amount in excess of £100 of the income of the residue, and finally the residue of her estate upon the death of the last of her father's descendants living at her death, to the secretary of the Oxford Group, and provided that the receipt of the secretary was to be a full and sufficient discharge to the trustee for the payment of the same. On behalf of the trustee of the testatrix's will, it was contended that, as the Oxford Group consisted of an unascertainable number of persons, and had no constitution, and as the secretary was not answerable to any person or board in respect of financial transactions, the gift failed. On behalf of the defendants, it was contended that there was in existence an association capable of taking under the will. It was also contended that, in default of the first contention, the will ought to be construed in such a way as to make the legacy applicable for a certain purpose, or, alternatively, that the gift was a charitable one:—

HELD: (i) as, on the evidence, there was no association known as the Oxford Group, and as the group had no constitution, it was not capable of taking under the will.

(ii) as the will clearly stated that the money was to be paid to the secretary of the Oxford Group, the court was not in a position to construe the will so as to apply the gift for a purpose.

(iii) as the aims of the Oxford Group could not be regarded as being directed towards the promotion of religion—namely, "the promotion of the spiritual teaching of the religious body concerned and the main-

tenance of the spirit of its doctrines and observances"—the gift was not a charitable one, and must, therefore, fail.

EDITORIAL NOTE. The first question that arises in this case is purely one of fact—namely, whether or not there is such a body as the Oxford Group. This being answered in the negative, it is obvious that there is no proper officer who can give a discharge to the trustee of the will on payment of the legacy. The gift thus being one to a non-existent institution, it was argued that it could nevertheless be supported as being a gift for a purpose. If this contention had been successful, the court would have been asked to order a scheme to be prepared for the administration of the gift. The court, however, held that this was not a gift for a purpose, and, further, that the purposes of the Oxford Group were not charitable purposes, with the result that the gift failed altogether.

AS TO GIFTS TO NON-EXISTENT INSTITUTIONS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 230-234, paras. 340-347; and FOR CASES, see DIGEST, Vol. 8, pp. 305-312, Nos. 839-933.

AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

Cases referred to :

(1) *Re Mann, Hardy v. A.-G.*, [1903] 1 Ch. 232; 8 Digest 257, 182; 72 L.J.Ch. 150; 87 L.T. 734.

(2) *Re Weoster, Pearson v. Webster*, [1912] 1 Ch. 106; 8 Digest 310, 916; 81 L.J.Ch. 79; 105 L.T. 815.

(3) *Re Wedgwood, Sweet v. Cotton*, [1914] 2 Ch. 245; 8 Digest 308, 897; 83 L.J.Ch. 731; 111 L.T. 436.

(4) *Re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876; 8 Digest 310, 908; 71 L.J.Ch. 459; 86 L.T. 292.

(5) *Keren Kayemeth Le Jisroel, Ltd. v. Inland Revenue Comrs.*, [1931] 2 K.B. 465; Digest Supp.; 100 L.J.K.B. 596; 145 L.T. 320; *on appeal*, [1932] A.C. 650.

SUMMONS by the executor and trustee under the testatrix's will to determine whether or not a gift to the Oxford Group was a valid gift, or whether the legacy was void for uncertainty. The facts are fully set out in the judgment.

W. G. Hart for the plaintiff.

H. B. Vaisey, K.C., and *Wilfrid M. Hunt* for the first two defendants.

C. R. R. Romer, K.C., and *J. H. A. Sparrow* for the third defendant.

A. Andrewes Uthwatt for the Attorney-General.

BENNETT, J.: This summons raises a question with regard to a gift contained in the will of Margaret Grace Thackrah, dated Sept. 15, 1936, the testatrix having died on Jan. 10, 1937. By her will, she appoints the plaintiff her executor, and she gives some specific and pecuniary legacies, including a legacy in these terms :

I give and bequeath £500 free of duty to the secretary or other proper officer (whose receipt shall be full and sufficient discharge) of the Oxford Group whose offices are at present situated at Brown's Hotel Dover Street in the city of Westminster.

She then disposes of her residue upon trust to pay some annuities, and then at his discretion upon trust, out of the income of the residue, in consultation with her nephews, the trustee is to expend up to £100 per

annum in the relief of the genuine needs that may from time to time arise of the descendants of her late father for the period of the life of the survivor of the descendants living at her death, and then she directs her trustee to pay any amount in excess of £100 of the income of the residue

... to the secretary or other proper officer (whose receipt shall be full and sufficient discharge) of the Oxford Group whose offices are at present situated at Brown's Hotel Dover Street aforesaid.

At the death of the survivor of the descendants of her father living at her death, the testatrix directs her trustee to pay the residue of her estate

... to the secretary or other proper officer (whose receipt shall be full and sufficient discharge) of the Oxford Group whose offices are at present situated at Brown's Hotel Dover Street aforesaid.

The trustee has found difficulty in carrying out the testatrix's directions to pay the legacy in question and the surplus income to the person indicated. The first question asked by the summons is as follows :

Whether the plaintiff as executor and trustee of the will of [the testatrix] ought to pay the legacy of £500 free of duty bequeathed by the said will " to the secretary or other proper officer of the Oxford Group whose offices are at present situated at Brown's Hotel Dover Street in the city of Westminster " and the other benefits thereby bequeathed in like terms to the defendants Roland Whitwell Wilson and Frank Nathan Buchman or to either and which of them."

The question is whether or not there is a body or an association known as the Oxford Group of which either of the two named defendants is the secretary or other proper officer. The first question which has been debated at some length is a pure question of fact—namely, is there, or has there ever been, an association or a society of individuals, banded together under the name of the Oxford Group, of which one or other or both of these gentlemen are or is the secretary or proper officer ? There have been filed on behalf of the defendants Roland Whitwell Wilson and Frank Nathan Buchman two affidavits of considerable length, in which they have sought to prove that there is a society which bears the name of the Oxford Group. The evidence fails to establish the existence of any such body. Before one can find an association, there must be some rules, either written or oral, by which those who are supposed to be members of it are tied together. I think that they would probably be written rules. There must be some constitution. One of the pieces of evidence which has been put in on behalf of the defendants is a book. I think it is exhibited to two affidavits, and to the joint affidavit of Mr. Wilson and Professor Grensted, sworn on July 12, 1938. The opening words of that book are these :

You cannot belong to the Oxford Group. It has no membership list, subscriptions, badge, rules, or definite location. It is a name for a group of people who, from every rank, profession, and trade, in many countries, have surrendered their lives to God and who are endeavouring to lead a spiritual quality of life under the guidance of the Holy Spirit.

With that statement in mind, it is impossible to hold that there is or was in existence any association to which anybody could be the secretary or other proper officer capable of giving a receipt for the legacy or share

of surplus income, when it falls to be paid, of the residue of this testatrix's estate. While Mr. Vaisey and Mr. Hunt, on behalf of the two defendants Mr. Wilson and Mr. Buchman, have strenuously contended that there is such an association, it is noticeable that the Attorney-General, represented by Mr. Uthwatt, has been emphatic that there is no such association. Thus, I answer the first question in the negative.

The next question that is asked by the summons is as follows :

If the court shall be of opinion that the plaintiff ought not to pay the said legacy and other benefits to the said defendants or either of them whether the said legacy and other benefits are valid bequests and if so to whom the plaintiff ought to pay the same or whether such legacy and benefits are void for uncertainty.

- B The way in which the case is put, upon the conclusion that there is no such society as the Oxford Group, is this. Upon the true interpretation and construction of the testatrix's will, she had made the bequests contained in it, not to an existing association or body or legal entity, but for certain purposes. Those purposes are the purposes for which the Oxford Group or movement existed at the time of her death, and those purposes are, so it is alleged, exclusively charitable. The argument rests, in the first instance, upon the true construction of the language that the testatrix has used, the question being whether or not, upon the words used, it can fairly be said that she intended her gifts to go, not to an institution which had no existence, but for a particular purpose, the particular purpose alleged being one for the advancement of religion. On the language of the will, I do not think that the matter is open to doubt. The testatrix obviously thought that there was an association or body, which bore the name of the Oxford Group, of which there was, or there could be, a secretary or proper officer who could give a receipt to her executor for the gifts which she was making to that body. The words, in my judgment, are plain and unambiguous, and the mere fact that she happened to have had an erroneous belief as to the existence of such a body does not either enable or entitle me to misconstrue the plain language that she has used. To hold that this gift is a gift for a purpose, and not to an association, would be, I think, to misconstrue the plain language which the testatrix has used in three places in her will. It was sought to liken the case to four decided cases. The first case is *Re Mann, Hardy v. A.-G.* (1), where the gift by the testatrix was to her trustees of a sum of £3,000

... to be applied by them in such manner as they shall consider most expedient for the benefit of the Mann Institute.

- H On the language of this will, there is no trust for anybody. It is a gift to the society. In *Re Mann, Hardy v. A.-G.* (1), it was plainly a gift made by the testatrix for a purpose, the purpose being the benefit of a village institute. That was a good charitable purpose, and there was no difficulty in holding, as FARWELL, J., did hold, that that was a gift for a charitable purpose, and one to which effect could and ought to be given. The language of the will used by the testatrix in that case is poles asunder from the language that the testatrix has used in the will

that I have to consider here. The second case relied upon and referred to is *Re Webster, Pearson v. Webster* (2), where the terms of the gift were as follow :

I give and bequeath unto the Ormond Home for Nurses any money that comes to me now from my father and will come from my mother also the furniture—my relations having taken out anything they may wish to have. Arrangements must also be made to carry on the home for the next few months with Mrs. Bell in charge. The money that comes in from the district goes towards the expenses of the upkeep and debts not paid by me must be paid. If necessary a committee might be formed of Dr. Hall Walker and several local Chelsea doctors.

Upon that language, of course, it not being possible to make a bequest to such a thing as a home—to bricks and mortar—JOYCE, J., had no difficulty in concluding, and it is the basis of his decision, that what the testatrix intended to do was to devote her property to certain purposes which were charitable. The language of the will was such that, upon its fair construction, the gift was to her trustees for charitable purposes. The third case, *Re Wedgwood, Sweet v. Cotton* (3), also before JOYCE, J., was a case of a testatrix giving a legacy of £1,000 to "Saint Mary's Home for Women and Children, of 15, Wellington Street, Chelsea." Again, one cannot give a sum of money to a home. A home is bricks and mortar. Upon that language, JOYCE, J., was able to hold, and he did hold, that the gift was for the purpose of the work carried on at the nursing-home, and so, those purposes being charitable, he was able to give effect to them by means of a scheme. The last case—and it is, I think, the one upon which most reliance was placed by the Attorney-General, and also by Mr. Vaisey and Mr. Hunt—is a case before BUCKLEY, J., as he then was, *Re Davis, Hannen v. Hillyer* (4), where the gift was of a sum of £500 to "the Home for the Homeless, 27, Red Lion Square, London." There never was such an institution, and there never had been such an institution, but BUCKLEY, J., was able to arrive at the conclusion, from matters contained in the will, that the gift there was for a purpose. He arrived at that conclusion, first of all, because of the inclination in favour of charities which the court has, secondly, because of the terms of the gift—"the Home for the Homeless"—and, lastly, because the gift in the will was in the middle of a number of other gifts which were charitable, and, for those reasons, although it did at first sight look as if the case was one where the testatrix had given the property to a particular institution rather than for a purpose, he felt himself able to arrive at the conclusion that the gift was given for a purpose, and so ordered it to be applied in pursuance of a scheme. In my judgment, however, there is no ground, on the language here, and on the facts proved, for arriving at any such conclusion. There were individuals who had an address at Brown's Hotel, the address named in the will. They were not members of any body or association, but from there they did carry on certain activities, and there is no doubt in my mind that the testatrix thought that the Oxford Group existed as an organised body of some kind. She was wrong, and, there being nobody who answers the description of an institution which she

thought existed, it is impossible for me to misconstrue her language by saying that she intended the gifts which she made by her will to go, not to that institution, but for the purpose, and, on that ground, I would hold, and I do hold, that the gift fails. If, upon its true construction, this gift were held to be one for the purposes of the Oxford Group, then it would be void for uncertainty, unless it was charitable. If it were charitable, then the court would see that it did not fail because of uncertainty, and would direct the bounty of the testatrix to be disposed of in accordance with a scheme. However, the question which would then arise would be whether or not the purposes for which this Oxford Group exists are charitable. Charity has a technical meaning in the eye of the law. A large number of people would regard as charitable objects which the law does not regard as so being, and it is suggested that the purposes for which the Oxford Group exists—to be ascertained, as I understand it, from the book exhibited to the joint affidavit of Mr. Wilson and Professor Grensted—are for the advancement of religion. There has been a pronouncement in 1931 by ROWLATT, J., and LORD HANWORTH, M.R., in *Keren Kayemeth Le Jisroel, Ltd. v. Inland Revenue Comrs.* (5), in which ROWLATT, J., a great authority upon such questions as charities, uses these words, at p. 469 :

The promotion of religion meant the promotion of the spiritual teaching of the religious body concerned and the maintenance of the spirit of its doctrines and observances.

In the same case, LORD HANWORTH, M.R., says, at p. 477 :

The promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it—not merely a foundation or cause to which it can be related.

I do not find anywhere, in any of the evidence that has been adduced in this case on behalf of the defendants, that this group exists for the promotion of religion in the sense in which that phrase has been defined by ROWLATT, J., and by LORD HANWORTH, M.R., in the case to which I have just referred. It may seek to bind people together by religious bonds, and no doubt it does, but that is not what is meant by “the promotion of religion” as that phrase is understood in these courts. For that reason also, if I am wrong in the construction I put upon the language of the testatrix used in her will, I would conclude that the purposes for which the Oxford Group exists are not religious purposes within the meaning of that phrase as used in that case. For these reasons, I answer the second question also in the sense that the gift is invalid. The costs of all parties as between solicitor and client will be taxed and paid out of the testatrix’s estate.

Declaration that gift invalid. Costs as between solicitor and client payable out of estate.

Solicitors : Denton, Hall & Burgin (for the plaintiff) ; Gamlen, Bowerman & Forward (for the first two defendants) ; Bird & Bird (for the third defendant) ; Treasury Solicitor (for the Attorney-General).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

Execution—Garnishee order—Banking account—Payments into account after service of order—“Any debt owing or accruing.”

B. Bank, Ltd., had an order served on them attaching any debt owing by the bank on the date of service of the order to the judgment debtor. Upon a summons, the county court judge held that, under that garnishee order, the judgment creditor was entitled to receive, not only the amount standing to the credit of the account of the judgment debtor at the date of the service of the garnishee order, but also moneys paid into the account between that date and the date of the hearing of the summons. On receipt of the garnishee order, the bank, in accordance with the usual practice, had opened a new account for the customer, and the new credits due to payments in appeared in their books in that new account. It was contended that the items in the new account were subject to the garnishee order by reason of the words “any debt owing or accruing to the judgment debtor from any other person (in this order called the garnishee)” in C.C.R., Ord. 27, r. 1:—

HELD: the garnishee order only affected debts in existence at the date of the service thereof, and the moneys subsequently paid in could not be subject to the order.

[EDITORIAL NOTE.] In the present case, a misapprehension seems to have arisen as to the meaning to be applied to the word “accruing” in the county court rule relating to garnishee orders. In the case of a banking account, the position, so to speak, becomes crystallised at the date of the service of the order, and subsequent payments in to the account are not subject to the order.

AS TO DEBTS CAPABLE OF ATTACHMENT, see HALSBURY, Hailsham Edn., Vol. 14, pp. 108-112, paras. 172-176; and FOR CASES, see DIGEST, Vol. 21, pp. 624-627, Nos. 2105-2120.]

Cases referred to:

- (1) *Jones v. Thompson* (1858), E. B. & E. 63; 21 Digest 625, 2109; 27 L.J.Q.B. 234; 31 L.T.O.S. 80.
- (2) *Tapp v. Jones* (1875), L.R. 10 Q.B. 591; 21 Digest 624, 2105; 44 L.J.Q.B. 127; 33 L.T. 201.
- (3) *Webb v. Stenton* (1883), 11 Q.B.D. 518; 21 Digest 625, 2107; 52 L.J.Q.B. 584; *sub nom. Re Hatton, Webb v. Stenton*, 49 L.T. 432.

APPEAL by the garnishees, Barclays Bank, Ltd., from an order of His Honour JUDGE HARGREAVES, sitting at St. Albans County Court, dated Nov. 15, 1938. The facts are fully set out in the judgment of SCOTT, L.J.

Valentine Holmes for the appellants.

Cyril Salmon for the respondent.

SCOTT, L.J.: In this case, the garnishees, Barclays Bank, Ltd., had an order served upon them in the usual way under C.C.R., Ord. 27, r.1, attaching any debt owing by the bank on the date of service to Jackson, the judgment debtor in certain proceedings, against whom the plaintiffs had obtained judgment. The county court judge held, upon

a summons coming before him, that, under that garnishee order, the judgment creditor was entitled to receive from the bank, not only the amount standing to the credit of Mr. Jackson's account with them as a customer on the date when the garnishee order was made, but also credit items coming into existence between that date and the date of the hearing

A before the judge by reason of payments into his account by the judgment debtor. On receipt of the garnishee order, the bank, in accordance with the procedure which Mr. Holmes, on behalf of the appellant bank, said he understood to be the usual practice in this country, had opened a new account for the particular customer, in order to keep

B clear upon their books the position as at the date of the receipt of the order, and the new credits due to payments in appeared in their books in the new account. As between themselves and the judgment creditor, of course, the way they keep their books is a private matter concerning them, and does not affect the judgment creditor; but it serves to bring

C out very clearly the question at issue. The judge read C.C.R., Ord. 27, r. 1, which is in the same terms as those of R.S.C., Ord. 45, r. 1, with certain differences. The two rules are identical in the wording, which is important for the decision of this appeal, and C.C.R., Ord. 27, r. 1, provides as follows :

D Any person who has obtained a judgment or order (in this order called "the judgment creditor") for the payment of money may take proceedings to obtain payment to him of the amount of any debt owing or accruing to the judgment debtor from any other person (in this order called "the garnishee") or so much thereof as may be sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

E The judge interpreted those words "any debt owing or accruing" as meaning any debt then owing or any debt not then owing but accruing subsequently, and consequently held that the garnishee order in this case had the effect of attaching, not only the credit standing to the benefit of the customer as on the date of the service of the order, but also the

F subsequent credit created by subsequent payments in by the customer to his new account at the bank. He arrived at that result in these words :

It appears to me that the words "due and owing" in the summons refer to and cover all debts owing by the bank to the debtor at the date of the summons—that is to say, to the sums standing to the credit of the debtor in the bank at that date. The words "or accruing from him to the said judgment debtor" must, it appears to me, refer to something else, and can only have reference to any debts that accrue

G subsequent to the service of the summons. If the words "from time to time" were added, the matter would be plainer still, but, as the words stand at present, they appear to me to refer to the future.

He therefore decided accordingly, and in so doing he disregarded a series of decisions by the courts of this country ever since garnishee

H proceedings were first authorised by the Common Law Procedure Acts, which contained rules in the same form as that of the Supreme Court rules to-day and the County Court rule which I have just read. All those decisions make it quite clear that a garnishee order attaches no debts which do not exist at the moment when the order is made and served, and, further than that, the applicant for a garnishee order is

required both by the Supreme Court Rules and by the County Court Rules to swear an affidavit as to the amount of the debt alleged then to be owing to the judgment debtor, and the jurisdiction to make the order is limited to debts so proved by affidavit. The cases begin with the decision in 1858 in *Jones v. Thompson* (1), where it was clearly laid down, by a court consisting of WIGHTMAN and CROMPTON, JJ., that the words "or accruing" were limited to the substantive noun "debt," and that, in order to satisfy those words, there had to be a debt in existence, although it might be a debt which was not payable till a subsequent date—*debitum in præsentī solvendum in futuro*. The same interpretation was followed in *Tapp v. Jones* (2), and again in *Webb v. Stenton* (3), where LORD Esher, M.R., expressed the decision of the court in absolutely unambiguous language at p. 523 :

Now can it [the accruing debt] mean any debt which may at any future time arise between the judgment debtor and the person sought to be made a garnishee, there being no contract at that time between the judgment debtor and such person, or anything which can make any relation of any kind, legal or equitable, between them ? To state the proposition is to show its absurdity. Then can it be this, that it may be a debt which there is some probability may in future arise ?

Then he pointed out that that would not do. The county court judge evidently did not have those cases drawn to his attention, and his decision was clearly wrong.

Mr. Salmon has done his best to uphold the order in favour of the respondent by the contention that the rule must be read as speaking to the date of hearing, and that it covers, therefore, debts accruing between the date of the summons and affidavit upon which it was obtained and the date of hearing of the summons. However, that is contrary to the clear meaning of the rule, and contrary to the clear decisions which have been given over a long period of time. The appeal must be allowed, with costs.

FINLAY, L.J. : I am entirely of the same opinion. I think that the case is completely covered by authority, and, therefore, I do not desire to add anything.

DU PARCQ, L.J. : I agree, and have nothing to add.

Appeal allowed, with costs.

Solicitors : *Richards, Butler, Stokes & Woodham Smith* (for the appellants) ; *T. Anderson Davis* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Barrister-at-Law.]

WILLIAMS v. WILLIAMS (BY HIS GUARDIAN).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), February 17, March 9, 1939.]

Divorce—Desertion—Insanity—Certification of deserting respondent—Statutory period interrupted—Duty of justices to find and state date of actual desertion.

The respondent deserted his wife in 1933, and a year later he was certified as a person of unsound mind, and put under restraint. He remained under restraint until the hearing of this petition. On Jan. 21, 1938, the petitioner commenced the present proceedings for dissolution of the marriage on the ground of desertion for a period of 3 years immediately preceding the presentation of the petition:—

HELD: the respondent, being incapable of any mental or moral activity, was incapable after 1934 of any intention to desert his wife, and there had not been desertion for the period of 3 years.

It is the duty of justices, when making a finding of desertion, to state in their order the date of the commencement of the desertion.

EDITORIAL NOTE. The question here is whether the supervening insanity during the period of the 3 years' desertion required by the 1937 Act prevents the continuance of that desertion. Desertion is a question of intention, and necessitates an exercise of the will, and it is therefore held that, on a person becoming of unsound mind, the continuance of the desertion ceases.

AS TO DIVORCE ON THE GROUND OF DESERTION, see HALSBURY, Supp., Divorce, para. 971; and FOR CASES, see DIGEST, Vol. 27, p. 319, Nos. 2974-2977.]

Cases referred to:

- (1) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 27 Digest 76, 601; 89 L.J.K.B. 1161; 124 L.T. 23.
- (2) *Thompson v. Thompson* (1858), 1 Sw. & Tr. 231; 27 Digest 309, 2871; 27 L.J.P. & M. 65; 31 L.T.O.S. 302.
- (3) *Townsend v. Townsend* (1873), L.R. 3 P. & D. 129; 27 Digest 311, 2892; 42 L.J.P. & M. 71; 29 L.T. 254.
- (4) *Drew v. Drew* (1888), 13 P.D. 97; 27 Digest 319, 2975; 57 L.J.P. 64; 58 L.T. 923.

PETITION by wife for dissolution of the marriage on the ground of desertion. In May, 1934, the wife obtained an order from the Wallasey justices adjudging, *inter alia*, that the husband had been guilty of desertion, but in June, 1934, the husband was certified as insane, and was thereafter, and continued to be, detained in a mental hospital.

The respondent, appearing by his guardian *ad litem*, denied desertion, pleading in the alternative that, if there had been desertion, such desertion, by reason of the restraint put upon him, had not continued down to the date of the presentation of the petition.

J. L. A. Gradwell for the petitioner.

J. Roland Adams for the respondent.

LANGTON, J.: The facts in this case are clear and uncontroverted, but they raise in direct form a point which, so far as I am aware, and so far as the industry of counsel has been able to ascertain, is quite bare of authority. The material facts are that in May, 1933, the respondent,

Thomas Herbert Williams, deserted his wife, Jane Dorothy Williams, the petitioner, and that on June 26, 1934, the respondent was certified under the Lunacy Act, 1890, and put under restraint. He has continued in a slightly deteriorating condition, always under restraint, until the present day. The point raised for consideration by these facts is whether or not the respondent can properly be held to have deserted his wife for 3 years immediately preceding the commencement of the present proceedings on Jan. 21, 1938. A

The short history of the married life of the parties is as follows. They were married on Oct. 6, 1924, in the district of West Derby, in the county of Liverpool. There were no children of the marriage, and the union was never a happy one. The respondent was a heavy drinker, and at times used to stay out considerable portions of the night. In 1931, the wife ceased to sleep in company with the respondent, and, although they remained under the same roof, they had thenceforth nothing to do with each other, save that the husband took his meals in the house. For some time before the final parting, the spouses rarely spoke to one another. In May, 1933, the respondent left his wife completely, and on May 23 she brought proceedings against him before the magistrates at Wallasey. The bench found that the respondent had deserted his wife, and had wilfully neglected to provide reasonable maintenance for her. Unfortunately, the magistrates do not appear to have found the actual date of desertion, and, in view of the importance which such dates might possess under the Matrimonial Causes Act, 1937 (though it happens to be of no great importance in the present case), I venture to insist once again upon the importance of this duty of magistrates being scrupulously fulfilled. From the day when the respondent walked out of the house in May, 1933, he never returned to his wife. B C D E

These facts established clearly that the parting between the spouses was brought about by desertion on the part of the husband. The Matrimonial Causes Act, 1937, gives the petitioner a sufficient ground for divorce under sect. 2 (b) if he or she establishes that the respondent: F

... has deserted the petitioner without cause for a period of at least 3 years immediately preceding the presentation of the petition.

The petition in this present case having been presented on Jan. 21, 1938, and the respondent having been a lunatic under restraint since June 26, 1934, it is obvious that, during the whole of the last 3 years immediately preceding the presentation of the petition, the respondent has never been in any sense a free agent. He has appeared to these proceedings by his guardian *ad litem*, and the point taken upon his behalf by Mr. Adams is that desertion such as will constitute a matrimonial offence must be wilful, and that no man who is without a mind can be said to form any intention, and thus be guilty of a wilful act. The argument in favour of the petitioner is, if I may seek to epitomise it, that, whilst it is rightly held that, for the purposes of criminal law, no G H

lunatic could possibly form a criminal intent, in a civil matter such as the present, where it is proved to the satisfaction of the court that a spouse both formed the intention, and carried out the act, of desertion, it is possible—and, in the present case, just—to infer that the desertion would have continued over the statutory period.

- A Although it was common ground that no direct authorities could be found, both sides buttressed their arguments with well-known decisions from which they claimed that fair inferences could be made in favour of their respective sides. For my part, I have derived most assistance from the well-known decision in *Jones v. Newtown & Llanidloes Guardians* (1). In that case, the question arose under the Poor Law Amendment Act, 1850, whether a wife who had left her husband without justification, and had later become a lunatic, was chargeable to the guardians or to her husband. The court, consisting of the EARL OF READING, L.C.J., SHEARMAN and SANKEY, JJ., in a judgment that has often been cited with approval, and which has never been doubted, found unhesitatingly that the liability rested upon the husband. For present purposes, the first of the two important passages in the judgments is in that of the EARL OF READING, L.C.J., at pp. 384, 385 :

- D Here the wife has become a lunatic and continues to be insane. She is therefore unable to exercise any judgment. She cannot elect to return home. . . . Secondly, there is the passage in the judgment of SHEARMAN, J., at p. 385 :

- E Her desertion of her husband does not, like her adultery, determine his obligation, it only suspends it during the time that she wilfully absents herself. Here, she might have returned to her husband and called upon him to maintain her at any time before she became insane. Upon her becoming insane her freedom of will came to an end, her absence from her home ceased to be wilful, with the consequence that her husband's obligation to maintain her revived.

- F It is to be observed that here both judges insist—and, in fact, base their decision—upon the fact that the wife is a lunatic, and is unable to exercise any judgment, or, indeed, to possess any freedom of will.

- G I turn now to the decision of SIR CRESSWELL CRESSWELL in *Thompson v. Thompson* (2). The case was one in which the wife sought a judicial separation on the ground of her husband's desertion. The facts are recited and found by the judge at p. 234, but the material fact upon which the judgment was based was that the original parting, which subsequently extended over a long period of years, had been a parting to which the wife consented, in order that the husband might seek employment. SIR CRESSWELL CRESSWELL used this language, at p. 233 :

- H There is a difficulty in defining "desertion," and cases may arise in which it would be very difficult to say whether the facts proved would fall within the meaning of the statute. Without attempting to lay down a precise definition of "desertion," I think it undoubtedly must mean a wilful absenting himself by the husband; and that such absence and cessation of cohabitation must be in spite of the wish of the wife; she must not be a consenting party.

Here, if any authority be needed, is abundant and unchallenged authority that desertion, in order to constitute a matrimonial offence, must be

wilful. Again, in *Townsend v. Townsend* (3), SIR JAMES HANNEN said, at p. 130 :

It is essential to the constitution of desertion that there should be a voluntary abandonment by the husband of the society of the wife against her will. In the present case the original withdrawal of the respondent from his home was with the knowledge and consent of the petitioner for the purpose of concealment from those in search of him. He never afterwards voluntarily absented himself from her, but was prevented rejoining her either by his imprisonment or by her refusal to resume cohabitation. A

In that case, the husband, who was wanted by the police, separated from his wife, in the first instance, with her knowledge and consent, for the purpose of avoiding arrest. While in prison, and afterwards, B he kept up a correspondence with his wife, and made repeated endeavours to induce her to return to cohabitation. She, however, refused, and cohabitation was never resumed. The case is interesting from two points of view. In the first place, SIR JAMES HANNEN insists upon the necessity for a "voluntary" abandonment by the husband in order to constitute C desertion, thus following the principle laid down by SIR CRESSWELL CRESSWELL in *Thompson v. Thompson* (2). Secondly, it provides an instructive contrast to a later case, *Drew v. Drew* (4). In that case, the same judge, SIR JAMES HANNEN, P., found desertion against the husband, who absconded to New South Wales to escape arrest upon a charge of D embezzlement. He was subsequently brought back to this country in custody, tried, and sentenced to 10 years' penal servitude. The judge was, however, satisfied, upon the facts, that, at the time of his flight, Mr. Drew had every intention of deserting his wife and did so desert her, and held that the period of desertion would continue, notwithstanding E the fact that the husband had been brought back to this country in custody. This case formed the high-water mark of Mr. Gradwell's argument on behalf of the petitioner. He claimed that, just as SIR JAMES HANNEN, P., in *Drew's* case (4) had declined to allow the period of desertion to be interrupted by the mere misfortune of incarceration, so, F in the present case, where Mr. Williams had been apparently guilty of desertion until the moment when he lost his reason, the period of desertion should also be allowed to continue. This argument is not unattractive, for there is nothing in this case to suggest any kind of hope or belief that, if Mr. Williams had continued sane, he would in any way have G changed the course of conduct upon which he had embarked with deliberation, and in which he had continued without intermission. Furthermore, all the merits of the case lie on the side of the petitioner. I am afraid, however, that the argument rests upon a fallacy, since it is not the physical restraint which has been put upon Mr. Williams as H a lunatic which constitutes the real bar to making a decree against him. It is true that he is restrained much as Mr. Drew was restrained, but, whereas Mr. Drew could have formed, and, even when in prison, have given expression to, a change of mind and heart towards his wife, Mr. Williams is quite incapable of any such mental or moral activity. This

distinction appears to me to touch the core of the present case, and to determine it in favour of the respondent. The regret which I feel at being obliged to refuse a decree to the petitioner is tempered by the consideration that, within the lapse of a short time, she may have another remedy open to her. The petition must be dismissed.

A *Petition dismissed, with costs.*

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the petitioner); *Lightbounds, Jones & Co.*, agents for *Owen, Dawson & Wynn-Evans*, Liverpool (for the respondent).

[*Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.*]

Re TRUSTS OF A DEED DATED JULY 14, 1937.

Re TRUSTS OF A DEED DATED NOVEMBER 30, 1937.

TRANSPORT AND GENERAL CREDIT CORPORATION, LTD.
v. MORGAN.

[CHANCERY DIVISION (Simonds, J.), February 21, 22, 23, 1939.]

Hire-purchase—Financing hire-purchase agreements—Vendor's equitable lien—Approbation and reprobation—Validity of charge—Moneylending transaction—Companies Act, 1929 (c. 23), s. 266.

W., Ltd., carried on the business of letting out wireless sets and other chattels on hire-purchase and deferred-payment terms, and they owned beneficially the whole of the issued capital of R., Ltd. By an agreement dated June 8, 1936, between W., Ltd., and R., Ltd., it was recited that on Mar. 12, 1936, it had been agreed between the parties that R., Ltd., should thenceforth carry on the business of letting and selling chattels previously carried on by W., Ltd., and it was agreed that for a period of 3 years from Mar. 12, 1936, whenever a customer made a request to W., Ltd., for the hire-purchase or purchase of a chattel, R., Ltd., would purchase such chattel at its retail price, less a discount of 15 per cent., which might be varied from time to time, and that immediately after such purchase R., Ltd., would let or sell the chattel to the customer on hire-purchase or deferred-payment terms. In the event of any hire-purchase or sale agreements determining before the total rent had been paid, W., Ltd., agreed to purchase the chattel from R., Ltd., at the price paid by R., Ltd., less the amount of the rent or instalments paid by the hirer. By a trust deed, dated July 14, 1937, R., Ltd., agreed to assign or lodge with certain trustees, and pledge with them, and keep so pledged, up to the amount therein mentioned, agreements of hiring and hire-purchase covering certain transactions, and charged in favour of the trustees all the other assets of R., Ltd., as a floating charge. The deed further provided that the security was to become effective on failure by R., Ltd., to pay any moneys represented by the notes, and, that, on their security becoming enforceable, by notice in writing to R., Ltd., the trustees might declare all the company's notes then outstanding to be due and payable immediately, and that the trustees should be at liberty forthwith to sell specifically mortgaged assets and enter upon, and take possession of, property subject to the floating charge. W., Ltd., guaranteed the due payment of all the notes of R., Ltd. The notes in question bound R., Ltd., to pay to the bearer 4, 5 or 6 months after date the amounts advanced with 10 per cent. interest to date of maturity. Another contemporaneous agreement between R., Ltd., and W., Ltd., of the one part, and the plaintiffs and other members of a group of finance companies, of the other part, bound the

finance companies to take up and discount notes of R., Ltd., counter-signed by the trustees, up to the amount of the effective working capital of W., Ltd. The agreement also provided that W., Ltd., and R., Ltd., would pledge to, and deposit with, the trustees all existing hire and hire-purchase agreements, and would issue trust notes to the existing trust note holders only so long as they should be willing to take them up and discount them. In Feb., 1938, W., Ltd., and R., Ltd., defaulted. The trustees made the requisite declaration, and all notes outstanding became immediately due and payable. They then appointed a receiver, who received instalments as they fell due under the agreements, recovered possession of chattels in cases of default, and received the proceeds where he had himself sold chattels. On Mar. 16, 1938, a valid resolution was passed to wind up W., Ltd., and a similar resolution to wind up R., Ltd., was passed on May 19, 1938. At that time, there was a large balance due from R., Ltd., to W., Ltd., under their agreement of June 8, 1936 :—

HELD : (i) the charge created by the trust deed was not defeated by any vendor's equitable lien in favour of W., Ltd., in respect of unpaid purchase money under the agreement of June 8, 1936, because (a) W., Ltd., had not made out that it attached in respect of any particular chattel, and (b) in the case of an ordinary sale of a commercial article under a commercial agreement, there could be no vendor's lien other than that which the Sale of Goods Act, 1893, itself provided.

(ii) even if a vendor's equitable lien could be applicable to such sales, R., Ltd., could not in equity both approbate by holding out the security to the finance group, with the approval, and at the instigation, of W., Ltd., and then reprobate by withdrawing the security, because it was subject to the prior lien of W., Ltd.

(iii) notes issued by R., Ltd., after Nov. 12, 1937 (6 months before the commencement of the winding up of R., Ltd.), were not invalid under the Companies Act, 1929, s. 266, as the floating charge was created on July 14, 1937, the date of the execution of the trust deed.

(iv) so far as the plaintiffs were concerned, this was a solitary transaction, and, though empowered by their memorandum of association to lend money, they were not carrying on the business of moneylenders. The transaction represented by the trust deed and the notes was not a moneylending transaction, as the financing of hire-purchase agreements and deferred-payment agreements had become a recognised mercantile service.

EDITORIAL NOTE. It is here again held that the financing of hire-purchase agreements is not a moneylending transaction. The transaction in this case was of a different form from that in *Olds Discount Co., Ltd. v. Playfair, Ltd.*, [1938] 3 All E.R. 275 ; Digest Supp., and the company providing the finance does not seem to have been engaged in financing hire-purchase agreements for any one besides the other company here concerned. The judgment, however, states in general terms that to describe the carrying on of a recognised mercantile service as moneylending is an abuse of language. It was attempted in argument to set up an unpaid vendor's lien in the case of a sale of goods other than those provided for in the Sale of Goods Act, 1893, but the view is expressed that the provisions of the statute in this respect are exhaustive, and that there is no other case in which such a lien can be set up.

AS TO WHO IS A MONEYLENDER, see HALSBURY, Hailsham Edn., Vol. 23, p. 181, paras. 263, 264 ; and FOR CASES, see DIGEST, Vol. 35, pp. 202, 203, Nos. 282-291.

AS TO UNPAID VENDOR'S LIEN, see HALSBURY, Hailsham Edn., Vol. 29, pp. 161-166, paras. 214-221 ; and FOR CASES, see DIGEST, Vol. 39, pp. 607-612, Nos. 2047-2096.]

Cases referred to :

(1) *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 529 ; 12 Digest 483, 3961.

- (2) *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67; 32 Digest 282, 598; 75 L.J.Ch. 58; 93 L.T. 718.
- (3) *Esberger & Son, Ltd. v. Capital & Counties Bank*, [1913] 2 Ch. 366; 10 Digest 790, 4951; 82 L.J.Ch. 576; 109 L.T. 140.

A ACTION by the plaintiffs on behalf of themselves and all other holders of notes secured by two deeds dated July 14, 1937, and Nov. 30, 1937, respectively, claiming that the trustees were entitled to a first charge on all agreements for hiring and/or hire-purchase agreements deposited with them, and on all money and goods coming into the hands of the defendant Morgan, as receiver of the defendant companies, as security for all notes issued by that company and still outstanding and held by the plaintiffs or other noteholders, and that such charge ranked as a first charge on such agreements and assets, and was valid against the defendant companies.

C *Rt. Hon. Sir William Jowitt, K.C., W. P. Spens, K.C., Wilfrid M. Hunt and M. L. Gedge* for the plaintiffs.

F. R. Evershed, K.C., and J. B. Lindon for the defendants Warner's Radio & Electric, Ltd.

Lionel Edwards for the trustees.

J. F. Bowyer for the defendant Henry Morgan.

D *G. P. Slade* for the defendants Rawire, Ltd.

SIMONDS, J.: This action is in a form very familiar in these courts. It is the form of action adopted to enforce the rights of debenture holders or debenture stockholders where debentures or debenture stock have been issued by a limited company, and in this case the plaintiffs sue on behalf of themselves and all other holders of notes secured by the deeds in question. However, as will presently appear, there are certain aspects of the case which make it difficult, perhaps, to treat this as a representative action in all respects. The defendants to these proceedings are, first of all, Mr. Henry Morgan, who, under the provisions of the trust deed, was duly appointed receiver, Mr. Colesworthy and Mr. Fitzgerald, who are trustees of two trust deeds, Rawire, Ltd., the company which issued the notes, Warner's Radio & Electric, Ltd., a company closely associated, as I shall presently have to point out in detail, with Rawire, Ltd., who were parties to the trust deed for the purpose of guaranteeing the notes, and, finally, Mr. Dulanty and Mr. Williams, who are trustees of a second trust deed to secure certain second charges.

H It is necessary to refer to the trusts of the deed, and to the terms of the notes which the plaintiffs seek to enforce. I need say only that the notes issued by the defendant company Rawire, Ltd., and now outstanding, secure a sum of some £290,000, and the plaintiffs themselves are holders of notes which secure over £50,000, so that very large sums are at stake. The trust deed of July 14, 1937, the parties to which were Rawire, Ltd. (which I will shortly call Rawire), the trustees, and Warner's Radio & Electric, Ltd. (which I will shortly call Warners),

recites the incorporation of Rawire and its share capital and issued share capital. It recites that the whole of the issued shares of Rawire are owned or held by or on behalf of Warners, and then recites the borrowing powers of Rawire under the memorandum. It then states that its sole business consists of the purchase, upon terms and conditions which, by a certain agreement of June 8, 1936, had been mutually agreed between Warners and Rawire, from Warners and Lawsons, another company, of certain goods, including radio sets, and the subsequent entering into of agreements for hire or hire-purchase of those goods. It then recites that, for the purpose of such business and for that of enabling and assisting the company—that is to say, Rawire—to purchase such goods and commodities and to hire the same, and otherwise to finance and assist Warners and Lawsons or either of them, in relation to the disposal on terms of hire-purchase of goods and commodities for the time being dealt in by either of them, the company proposes from time to time to issue notes. Then it recites that Warners have agreed to join in the deed for the purpose of guaranteeing the due payment by Rawire of the notes. The trust deed then proceeds to provide in the usual form. It provides for a covenant by Rawire to assign to, or lodge with, the trustees, and pledge to them, and keep so pledged, up to the amount thereafter mentioned, agreements of hiring or hire-purchase covering certain transactions. It then proceeds to charge in favour of the trustees all the other assets—a floating charge covering all the assets of the company, in general terms.

Then, by cl. 4, it provides that the company's notes, which are to be issued as I have stated, are to be certified by the trustees, and then it provides that no note shall be deemed to be secured by the trust deed unless it is so certified. It then provides the limit within which the trustees may certify, elaborate provisions being contained in the document for limiting the amount which may from time to time be issued upon these notes. It then provides, by cl. 10, that the company and Warners are to keep proper books, and to give the trustees facilities for the inspection and examination of them. By cl. 11, Rawire appoints the trustees to be the joint and several attorneys and attorney of the company, to execute, sign and do all deeds, instruments and things which may be necessary or expedient, and the deed then provides, in the common form, for the security becoming effective upon, amongst other things, the failure of the company to pay any moneys represented by the company's notes according to their tenor, purport and effect. Then, by cl. 14, it provides that, upon the security becoming enforceable, the trustees may by notice in writing to the company declare all of the company's notes then outstanding and not then matured to be due and payable immediately, and by cl. 15 it provides that, upon the security becoming enforceable, the trustees shall be at liberty forthwith to sell any of the specifically mortgaged assets, and to enter upon and take possession of the whole of the property subject to the floating charge.

It then provides, by cl. 18, for the disposition by the trustees of the moneys to arise by sale, and, by cl. 21, it provides that, after the security has become enforceable, the trustees may appoint any person to be receiver of the specifically mortgaged assets or the general assets of the company. Then, by cl. 30, Warners guarantee the due payment according to their tenor, purport and effect of each and every of the company's notes, and by cl. 31 it is provided that Warners shall not, during the continuance of the agreement, without the previous consent in writing of all the holders for the time being of the company's notes, execute or create any mortgage or charge upon its assets. The terms of that deed sufficiently indicate what is emphasised by the document to which I shall refer presently—namely, how intimate was the association of Rawire and Warners. Then the form of the note upon which the plaintiffs sue is scheduled to that trust deed, and the notes were in fact issued in this form. They provided that Rawire would on a future date (and that date was always 4, 5 or 6 months after the date of the issue of the note) pay to the bearer at the place therein specified the sum therein mentioned, which was in fact a sum equivalent to the amount in fact advanced, plus 10 per cent. to the date of maturity. The note further provided, as such notes usually do, that the holders of the notes were to be entitled *pari passu* to the benefit of the security created by the trust deed and of the trusts therein contained. Then the trust deed also contained, in a second schedule, the form of certificate which the trustees were to give on the issue of the notes.

That is a straightforward and simple document, and it is only necessary to refer, in connection with it, to a contemporary document from which it appears that the plaintiffs and the other persons who took up the notes bound themselves to do so. That is a document dated July 14, 1937, the same day, the parties to which were, first, Rawire, secondly, Warners, and, thirdly, a number of companies to which I may refer compendiously as the finance group, including the plaintiff company. That agreement recites that it is collateral to the trust deed to which I have just referred, and then it provides that for the period of one year from the date thereof the several members of the finance group will respectively take up and discount notes issued by the company and countersigned by the trustees as provided by the trust deed, up to, but not exceeding, the amount of the effective working capital of Warners, as defined by the trust deed, in the proportions set forth in the first schedule to the agreement. In the first schedule to that agreement, one finds the names of the several members of the finance group, and the proportions in which they bound themselves to take up the notes which were duly issued. I notice that the plaintiff company bound themselves to take up $\frac{2}{5}\%$ of the issued notes, subject to a maximum of £50,000.

Then the agreement further provided, by cl. 3, that Warners and Rawire jointly and severally undertook to agree with the finance group

and with the individual members thereof severally that Warners and Rawire would, during the currency of the agreement, and so long as any of the company's notes remained unsatisfied, maintain in full force and effect, and would respectively observe and perform in all respects, the several terms and conditions of an agreement of June 8, 1936, between Warners and Rawire, a copy of which was contained in the schedule. A To that document I shall have to refer at a later stage. Then, further, those two companies, Warners and Rawire, agreed that forthwith and from time to time thereafter the company—that is to say, Rawire—would pledge to and deposit with the trustees under the trust deed, and keep pledged and deposited, all existing and future agreements of hiring B or hire-purchase, and would issue trust notes to the then-existing trust note holders only so long as they should be willing to take them up and discount them. Then there is a certain provision—in effect, I think, for equality amongst the finance group—to which I need not refer, and in cl. 5 there is a provision with regard to the sale and discounting of C the notes by the members of the finance group. I think that there is nothing else in that document to which I need refer.

That being the trust deed, and that being the collateral agreement, notes were duly issued in accordance with their terms. Within a short time, however, Warners and Rawire fell upon evil days, and as early as D Feb., 1938—that is to say, within a little more than 6 months of the execution of the trust deed—they made default in payment of certain notes. Upon that, the trustees made the declaration contemplated by the trust deed, as a result of which all the trust notes became due and payable, and on Feb. 18, 1938, in accordance with the terms of the trust deed, E they duly appointed Mr. Henry Morgan to be receiver both of the specifically mortgaged assets and of the general property and undertaking of the company. He went into possession. He received (whether under the specific charge or under the general charge for this purpose does not matter) all the assets of the company—that is to say, Rawire— F including certain chattels which, although at one time they had been subject to hire-purchase agreements, had been taken back by Rawire. Under the terms of then extant hire-purchase agreements, he received instalments as they became due. He himself, by himself or by his duly appointed agents, recovered possession of other chattels the subject of G hire-purchase agreements where the hirer had made default or had determined the agreement, and he further received the proceeds of sale of certain articles which he himself had sold.

On Mar. 16, 1938, there was a valid resolution for the winding up of Warners, a creditors' voluntary winding up. On May 12, 1938, a similar H resolution was passed in regard to Rawire. Both these companies, accordingly, are in liquidation, and they have the same liquidators, Mr. Lean and Mr. Latham.

This action was duly commenced by writ on Aug. 19, 1938, and, so far as I have stated the facts, it must appear to be a simple and commonplace

action by debenture holders, or holders of debenture stock. The difficulties arise, however, from the defences which have been raised in this action, and they are three. First of all, it is said that the trust deed, and the trust notes secured thereby, cannot operate according to their tenor, because there is a vendor's lien for unpaid purchase money in respect of

- A certain goods of which Rawire obtained possession under the terms of agreements between Rawire and Warners, and that that vendor's equitable lien for unpaid purchase money has priority over the charge created by the trust deed. I think that in the course of the argument the assertion of that lien has been limited to those assets which were
- B subject to the floating charge only, and not to the specific charge. That is the first point. The second point which is raised is that the whole of the security is unenforceable, because the plaintiffs and other note-holders were moneylenders, and this was a moneylending transaction, and that the provisions of the Moneylenders Act had not been complied
- C with. Then, thirdly, it is said—and this is a minor point—that, inasmuch as some of the trust notes were issued less than 6 months before the winding up of the company, and were not issued for cash, the benefit of the floating charge cannot be claimed in respect of those notes.

- First of all, in order that I may examine the validity of the claim to a
- D vendor's lien, it is necessary to look a little more closely at the relation of Warners and Rawire. It has already appeared from the recitals to the trust deed that the whole of the capital of Rawire is owned by Warners. It has further appeared, in the course of the evidence or by admissions, that the control of Rawire is with Warners. Whether or
- E not all the members of Warner's board were members of Rawire I do not know, but I think that it is clear that all the members of Rawire's board were members of Warners, and it is not disputed that Rawire was wholly controlled by Warners. In fact, it was incorporated in order to serve the particular purpose of Warners. It was its creature, and did
- F its behest, and, in regard to the matters with which we are particularly concerned, its relations were defined by the agreement of June 8, 1936, to which reference was made in the collateral agreement of July 14, 1937, which I have already stated. That was an agreement which had been in operation for some time before that date. It is dated June 8, 1936,
- G and made between Warners and Rawire, and it recites as follows :

Whereas (a) Warners has for some time past carried on (*inter alia*) the business of letting wireless sets and other chattels on hire with an option to purchase the same and of selling wireless sets or other chattels upon the condition that the purchase price thereof shall be payable by instalments.

- H (b) Warners own beneficially the whole of the issued capital of Rawire and prior to Mar. 12, 1936, it had been agreed that Rawire should as from that date carry on the section of the business previously carried on by Warners relating to the letting and selling of wireless sets and other chattels as aforesaid for the period and upon the conditions hereinafter mentioned.

(1) For a period of 3 years from the said Mar. 12, 1936, whenever a customer makes a request whether verbal or written either that Warners shall let to such customer a wireless set or other chattel on hire with an option to purchase the same or otherwise or to sell a wireless set or other chattel to the customer upon condition that the purchase price thereof shall be payable by instalments Warners hereby

agree to sell and Rawire hereby agree to purchase such wireless set or other chattel at the retail price thereof less a discount which shall be agreed or varied from time to time by writing between the parties hereto but until so agreed shall be 15 per cent. of the said retail price. . . .

Then there is a proviso which I need not read. The agreement continues as follows :

(2) Immediately after the sale of a chattel to Rawire as hereinbefore provided Rawire shall enter into an agreement with the customer either for the letting on hire of the chattel with an option to purchase the same or for the sale thereof upon the condition that the purchase price shall be payable by instalments.

(3) Rawire hereby expressly waives notice of acceptance by Warners of Rawire's offer to purchase such chattels as hereinbefore contained.

(4) Rawire irrevocably appoints Warners to be the attorney of Rawire in its name or otherwise : (a) To enter into agreements with customers as provided by cl. 2 hereof and to demand, receive and give effectual discharges for all or any of the instalments or other moneys agreed to be paid by hirers or purchasers under the said agreements. (b) To give or receive all such notices as the said agreements and the acts or omissions of the parties thereunder may render necessary Rawire hereby ratifying and confirming and agreeing to ratify and confirm whatever Warners may so do as aforesaid.

(5) In the event of the determination of any of the said agreements before payment of the total rent Rawire hereby agrees to sell and Warners hereby agree to purchase the chattel the subject of the said agreement at the price paid therefor by Rawire and less the amount of the rent or instalments actually paid by the hirer.

That is the agreement which regulated the relationship between Warners and Rawire, subject to a variation of the terms as to discount, to which, for this purpose, I need not refer. The result of that, of course, is quite clear. Rawire were in law a separate entity from Warners. Rawire entered into a valid agreement for the purchase of articles as they were required for hire-purchase agreements, and, as between themselves and Warners, Rawire became in due course the owners of the articles, and, becoming the owners, as a matter of account it appears that there is a large balance due from Rawire to Warners. It is in those circumstances, and in respect of that general balance, that Warners claim that they have a vendor's lien upon the unpaid purchase money which must prevail over the charge created by the trust deed.

It seems to me that, upon numerous grounds, that claim to a lien must fail. In the first place, I am not satisfied upon the evidence that Warners have made out the case that, in respect of any particular chattel, it is not paid for, and it is the essential preliminary to the assertion of a lien that the plaintiff shall prove that he has not been paid for that article in respect of which he asserts his lien. It is true that there is a large sum due from Rawire to Warners upon the general balance of account, and, when I suggested to counsel who argued the case for Warners that he could establish his claim in regard to any particular chattel only by a somewhat artificial application of the rule in *Devaynes v. Noble, Clayton's Case* (1), he did not appear to assent to that proposal, though how else he could establish his claim that, in respect of any particular chattel, he had not been paid I fail to understand. However that may be, there are even greater difficulties in the way of that claim. This is a claim for a vendor's lien in respect of ordinary articles of commerce sold under an ordinary commercial agreement. No

case, as far as I know, has ever occurred, and I have not been referred to any authority, in which a vendor's equitable lien has been applied in the case of an ordinary chattel. It is quite true that there are observations in the books, and in particular in *Re Stucley, Stucley v. Kekewich* (2), which indicate that the doctrine of equity is applicable both to real and to personal property, and of course nothing that I can say reflects or is intended to reflect in the least upon that general proposition. It may be that, in regard to personal property, at any rate of some characters, the rule is applicable, as it is to the case of land. It appears to me, however, that it would be quite inconsistent with what I think is intended to be an exhaustive statement of the law in the Sale of Goods Act to say that, in the case of an ordinary sale of a commercial article under a commercial agreement, there can be any vendor's lien other than that which the statute itself provides. So far as I know, no such claim had ever been asserted before it was asserted in this case, and it would be extraordinary if such a claim could prevail, for, as I pointed out in the course of the argument, it must throw into confusion the law both in regard to bankruptcy and in regard to any other matters which has been treated as regulated by the same principles. It may be, as I have said, that in the case of certain personal property, and in particular choses in action which are not covered by the Sale of Goods Act, the law of the vendor's equitable lien may apply. I do not propose to hold in this case for the first time that it is a principle which is applicable to the ordinary sale of goods. However, supposing that I am wrong in that, and supposing that the equitable principle of vendor's lien is applicable to a sale of radio sets under an ordinary commercial agreement, and supposing it to be generally applicable, is it applicable under the particular conditions of this case? Again, it appears to me that there are fatal objections to the proposal that it should be here applied. What has happened in this case has been that Rawire, the owners of the chattel, have, with the approbation, and at the instigation, of Warners, and for their benefit, with one hand held out this security asking the finance group to lend money upon it, representing, so far as conduct can represent, that, at any rate, so far as Warners and so far as Rawire were concerned, it was a valid security, free from any charge on their part, and, since, upon the faith of that representation and by that conduct, they have obtained the finance for which they asked, it appears to me to be quite impossible, in accordance with any equitable doctrine which is administered in this court, that they should then, having obtained their money, withdraw with their other hand the security which they have offered, and say: "This is a security which is no security, because it is subject to the prior lien of Warners."

This is claimed as an equitable lien. What I have stated would appear to suggest that it is a lien founded upon no principle of equity whatever. On the contrary, it is a case in which the person asserting the lien approbates the transaction when he wants the money, and reprobates

it when, having got the money, he wants the security back. Whether it should be called waiver or whether it should be called estoppel I do not know, but it is a claim which, in a court of equity, cannot possibly be maintained or enforced. Therefore, for all those reasons, the first defence to this action must fail.

I will deal, secondly, with what I think I stated as being the third A defence to these proceedings, a defence which is based upon some distinction between the goods or property secured by the floating charge and the property secured by the specific charge. It arises in this way. The charge is created by the trust deed of July 14, 1937. The liquidation of Rawire—the issue of the notes—began on May 12, 1938. Six months B before that date would have been Nov. 12, 1937, and that date is relevant, because it is provided as follows by the Companies Act, 1929, s. 266 ;

Where a company is being wound up, a floating charge on the undertaking or property of the company created within 6 months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash C paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of 5 per cent. per annum.

The relevance of that is that it is claimed by Rawire that any notes issued by them, in so far as they were issued after Nov. 12, 1937, and D in so far as they were not issued for cash, are not valid security. That defence, and that distinction, in my view, must fail, in view of the authorities which have been cited to me. I do not think that it would be consistent with the decision of SARGANT, J., for instance, in *Esberger & Son, Ltd. v. Capital & Counties Bank* (3) to say that the floating charge E in this case was created at any date other than that of the execution of the trust deed on July 14, 1937. I am conscious that the result of that may be to provide a gap, in the sense that, under the ægis of the trust deed executed at an earlier date, there might be issued at a later date debentures or notes which would infringe at any rate the policy of the F Act. Nevertheless, I cannot in this court, in the face of the decisions upon exactly similar language in other sections of the Act, treat the floating charge as having been created on any day other than that on which the trust deed was executed. I may add that, in regard to the plaintiffs—and I have had no evidence about any other noteholders— G and so far as they are concerned, no distinction could be made in any case, because, upon the evidence, it is clear that the notes held by them and issued to them after Nov., 1937, were issued for cash, so that in any case they would bring themselves within the exception to that provision. I therefore hold, in regard to that defence, that the noteholders have a H security over the whole of the assets and undertaking of the company, whenever those notes were issued.

I come finally to the defence which has been argued perhaps more strenuously than any other point—namely, that this is a moneylending transaction, and that the plaintiffs are moneylenders. It is at this point

that it is difficult to regard this as, strictly speaking, a representative action, for it might be that, having regard to that plea, some of the noteholders could enforce their security and others could not. However, in the view which I take of the matter, and of the transaction which is here under discussion, I do not think that any distinction can be made.

- A The question is twofold: (i) is this a moneylending transaction? and (ii) is it a moneylending transaction by a moneylender? So far as the plaintiff is concerned, for reasons which I will presently give, I am satisfied that the plaintiff company are not moneylenders, by which I mean that they do not carry on the business of moneylending, and, accordingly, B even if this transaction in isolation might somehow be regarded as a moneylending transaction, that does not matter if the plaintiff himself is not carrying on the business of a moneylender.

- However, there is another aspect of it. Is this such a transaction that, if it were entered into by a person carrying on the business of C moneylending, it could be regarded as a moneylending transaction? For it is obvious that a transaction may be entered into by one carrying on the business of a moneylender which yet is not impeachable as being itself a moneylending transaction. It is now necessary to look rather closely into the nature of this transaction.

- D First of all, I should make some reference to the nature of the business carried on by the plaintiff company itself, and for that purpose I first look at the memorandum of association of the plaintiff company. The objects for which the plaintiff company was established, according to this memorandum, were, first:

- E To purchase, manufacture, or otherwise acquire any goods or commodities and to let the same on hire and/or to dispose of the same by hire-purchase or in any other manner.

Then, secondly, its object was to carry on the business of banking in all its branches, with all the ancillary powers which are set out at great

- F length in para. 2 of the objects. Thirdly, its object was:

To carry on and undertake any business, undertaking, transaction or operation, commonly carried on or undertaken by financiers, discount houses, capitalists, underwriters of companies, stock, shares or debentures. . . .

- Then there are numerous other objects, including the object of lending G money with or without security, and that of subsidising, assisting and guaranteeing the payment of money, or the performance of any contract, engagement or obligation, by any persons or companies, and, in particular, customers of the company, or any persons or companies with whom the company may have, or may intend to have, business relations.

- H It is quite clear that, although the lending of money is one of the manifold objects of the company, it cannot be said that the company was incorporated for the purpose of carrying on the business of a moneylender. I turn, then, to see what the company has in fact done. For the first two or three years of its existence, it did nothing except to purchase, and to let out upon hire-purchase agreements, certain motor

lorries, and, I think, other chattels. The last transaction of that kind to be entered into was in 1934, and from 1934 onwards the hire-purchase agreements which had been entered into were being worked out. Apart from that, and apart from some trivial business, I think, of bill discounting, the company did nothing until it entered into the transaction which is here under discussion, a transaction which, in my view, was A nothing more than an agreement by a number of finance houses, in conjunction with a dealer in a large way in a particular kind of article, to finance and foster a particular business. The finance group one and all entered into that agreement. They entered into an agreement with Warners and Rawire by which they undertook to finance, as from time B to time was required, the business of acquiring radio sets and other articles and letting them out on hire-purchase agreement or selling them on credit. That was the transaction, and from time to time, to carry out their obligation, they had to take up notes as their turn came. According to the ordinary use of language, it appears to me that it would C be an abuse to regard that as a moneylending transaction, or to regard the financier (if I may so call him) who undertakes that business as carrying on the business of moneylending. So far as the plaintiffs themselves are concerned, this is the solitary transaction. There was no system or continuity, and there is nothing from which I can infer D that they are not going to do one or all of the many other things which their memorandum authorises them to do. So far as they are concerned, this is a single transaction, in which they have financed a particular industry, and, therefore, so far as they are concerned, in my view, they are not carrying on the business of moneylenders. With regard to the E transaction itself, equally, it follows from what I have said that it is not, in my view, the business of moneylending that is being carried on.

It must be remembered that hire-purchase agreements now play a very large part in the commercial and social life of the community, and the financing of those hire-purchase agreements is an enormous F business, both in the city of London and elsewhere. It appears to me that the financiers and the dealers co-operate in the common venture of making feasible the whole business of hire-purchase agreements, which is now, for good or for evil, a necessary part of our social life. To regard one party to that common venture, which is now a recognised G mercantile service, as carrying on the business of a moneylender is, as I have said before, an abuse of language.

I was invited, but I declined, to look at the report of the Royal Commission as a result of which the Moneylenders Act was passed. Nevertheless, without looking at the report of the Royal Commission, H I am, I think, entitled to consider broadly the state of the law when the Moneylenders Act was passed, and the abuse, even, that that law was intended to remedy. It appears to me that, upon a consideration of those facts, it is quite impossible to construe the words of the legislature here—"moneylending," "the business of moneylending," and "money-

lending transactions"—covering a transaction of this kind, which, as I have said, has become a part of a normal mercantile transaction, and an essential part of the industry in a recognised commercial sense. For those reasons, therefore, apart altogether from the position of the plaintiffs, who do not carry on the business of moneylenders, I do not consider that this is a moneylending transaction within the meaning of the statute. Accordingly, that defence also fails.

Solicitors: *Maxwell, Batley & Co.* (for the plaintiffs and for the trustees and for the defendant Henry Morgan); *Kenneth Brown, Baker, Baker* (for the defendants Warner's Radio & Electric, Ltd., and Rawire, Ltd.).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

JORDAN v. JORDAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
February 10, 16, 17, March 13, 1939.]

Divorce—Desertion—Wife deserting party—Earlier petition by husband dismissed more than 3 years before present petition—No resumption of cohabitation—Earlier proceedings operating as suspension only of desertion—Matrimonial Causes Act, 1937 (c. 57), s. 6.

The respondent left her husband, the petitioner, on Oct. 16, 1932. On Mar. 1, 1933, the husband filed a petition for divorce which, with the prayer in the wife's answer, was, after protracted proceedings, ultimately dismissed on Oct. 19, 1934. On Jan. 17, 1938, the present petition for divorce on the ground of desertion for 3 years immediately preceding that date was filed. There was evidence that the wife had never claimed maintenance of any kind since the previous proceedings, and that on occasions when the parties had met, she merely sneered at the petitioner:—

HELD: (i) the institution and prosecution of proceedings did not terminate the desertion, but merely precluded the petitioner from asserting that the period of desertion continued to run during those proceedings.

(ii) it was not a condition precedent to the revival or continuance of the original desertion after the earlier proceedings were disposed of, that some active steps should have been taken by the petitioner towards bringing about a resumption of cohabitation.

(iii) in the circumstances, a decree *nisi* ought to be granted.

[EDITORIAL NOTE.] The previous authorities have settled that the bringing of proceedings in the Divorce Court are an interruption of the period of desertion. The question that arises here is whether, in a case where those previous proceedings have terminated more than 3 years before the presentation of the petition being heard, (a) the desertion was absolutely terminated by the bringing of those proceedings, (b) if that were not so, the desertion was automatically revived upon the termination of those proceedings. The first question is answered in the negative and the second in the affirmative. The affirmative answer to the second question is subject to this. The onus of proof is always on the petitioner to prove desertion at the material time, and it must depend upon the circumstances existing after the termination of the previous proceedings whether an inference of the revival of the desertion can properly be drawn.

AS TO THE EFFECT OF PETITION ON DESERTION, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 658, 659, paras. 968, 969; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to :

- (1) *Gibbs-Smith v. Gibbs-Smith*, [1939] 1 All E.R. 332; Digest Supp.
- (2) *Kay v. Kay*, [1904] P. 382; 27 Digest 308, 2850; 73 L.J.P. 108; 91 L.T. 360. A
- (3) *Stevenson v. Stevenson*, [1911] P. 191; 27 Digest 320, 2986; 80 L.J.P. 137; 105 L.T. 183.
- (4) *Bush v. Bush*, [1938] 4 All E.R. 598; Digest Supp.
- (5) *Marthews v. Marthews*, [1939] P. 97; [1938] 4 All E.R. 377; Digest Supp.
- (6) *Walton v. Walton*, [1939] P. 104; [1938] 4 All E.R. 382; Digest Supp.
- (7) *Johnson v. Johnson*, [1938] 3 All E.R. 765; Digest Supp.; 169 L.T. 489. B
- (8) *Cohen v. Cohen*, [1939] 2 All E.R. 39, n; Digest Supp.
- (9) *Thomas v. Thomas*, [1924] P. 194; 27 Digest 315, 2925; 93 L.J.P. 61; 130 L.T. 716.
- (10) *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694; 27 Digest 307, 2845; 38 L.J.P. & M. 14; 19 L.T. 575; *subsequent proceedings* (1874), L.R. 3 P. & D. 136.
- (11) *Mahoney v. M'Carthy*, [1892] P. 21; 27 Digest 566, 6247; 61 L.J.P. 41. C
- (12) *Pulford v. Pulford*, [1923] P. 18; 27 Digest 307, 2846; 92 L.J.P. 14; 128 L.T. 256.
- (13) *Papadopoulos v. Papadopoulos*, [1936] P. 108; Digest Supp.; 105 L.J.P. 21; 154 L.T. 242.
- (14) *Jackson v. Jackson*, [1924] P. 19; 27 Digest 308, 2852.
- (15) *Frowd v. Frowd*, [1904] P. 177; 27 Digest 556, 6106; 73 L.J.P. 60; 90 L.T. 175. D
- (16) *Knapp v. Knapp* (1880), 6 P.D. 10; 27 Digest 320, 2981; 49 L.J.P. 69; 43 L.T. 384.
- (17) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 27 Digest 202, 1735; 89 L.J.K.B. 1161; 124 L.T. 23.
- (18) *Boulton v. Boulton*, [1922] P. 229; 27 Digest 321, 2999; 91 L.J.P. 157; 127 L.T. 558. E
- (19) *Bowron v. Bowron*, [1925] P. 187; 27 Digest 561, 6168; 94 L.J.P. 33; 132 L.T. 773.
- (20) *Sifton v. Sifton*, [1939] 1 All E.R. 109; Digest Supp. F

UNDEFENDED PETITION by husband for dissolution of marriage on the ground of desertion for 3 years immediately preceding the presentation of the petition. The wife deserted the petitioner in Oct., 1932, but from June, 1933, to Oct., 1934, there were proceedings on a petition by the husband for divorce against the wife on the ground of adultery, which petition was ultimately dismissed. Since that date, there had been no resumption of cohabitation, and no offer to that end on either side. The question having arisen whether, assuming desertion by the wife in 1932, that desertion could be said to have revived after the dismissal of the later petition, so as to avail the husband in his subsequent petition on the grounds of desertion, the matter was adjourned for argument by the King's Proctor. G

R. J. A. Temple for the petitioner.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Earl of Drogheda for the King's Proctor. H

SIR BOYD MERRIMAN, P. : This is a husband's petition for divorce on the ground that his wife has deserted him without cause for a period of at least 3 years immediately preceding the presentation of the petition, which was filed on Jan. 17, 1938. The wife left the husband on Oct. 16, 1932, and there has been no resumption of cohabitation since that date.

- A Meanwhile the husband, on Mar. 1, 1933, filed a petition for divorce on the ground of his wife's adultery. The suit was undefended, and on June 14, 1933, a decree *nisi* was pronounced by LANGTON, J. On Dec. 18, 1933, upon affidavits explaining their failure to appear and defend the suit, the wife and the co-respondent named in the petition
- B obtained leave to appear in the suit, and it was ordered that the decree *nisi* should not be made absolute before Jan. 22, 1934. On Jan. 19, 1934, LANGTON, J., and I, sitting as a Divisional Court, by virtue of r. 46 of the Matrimonial Causes Rules then in force, ordered that the decree *nisi* be rescinded and the cause reheard. On Jan. 26, 1934, the
- C wife filed an answer denying the alleged adultery and making a cross-charge of adultery on the part of the husband, in respect of which she prayed for divorce. The co-respondent also filed an answer. On Oct. 17, 18, 19, 1934, the case was tried before me, on the merits, and on Oct. 19 I dismissed the prayer of the respondent's answer, dismissed the
- D co-respondent from the suit, and dismissed the husband's petition. Since that date, not only has there been no resumption of cohabitation, but also there have been no overtures to that end on the part of either spouse. In these circumstances, as there was no decision directly in point in relation to the period of desertion prescribed by the Matrimonial
- E Causes Act, 1937, after hearing the husband's evidence, I adjourned the case for the assistance of the King's Proctor. On the resumed hearing, the King's Proctor was represented by the Solicitor-General and Lord Drogheda.

- Before dealing with the arguments on the question of law, addressed
- F to me by the Solicitor-General, and by Mr. Temple, for the husband, I must amplify the outline of the facts already given. In his evidence on the present petition, the husband said that in 1930 the wife and the co-respondent, in the former suit became partners in a café, and that he pleaded with her to give up the business but without success. He said that
- G in Oct., 1932, he challenged his wife about a letter from the co-respondent which he had found in her bag, and that the wife said there was nothing in it, but that 2 days later—namely, on Oct. 16, 1932—he came home and found that she had gone without warning, never, in fact, to return. I ought, in passing, to mention that the present petition originally alleged
- H desertion as from that date, but, pursuant to an order dated Apr. 13, 1938, this was amended to an allegation of desertion in Oct., 1934. Mr. Temple informed me that this was done at the instance of the Divorce Registry, because the previous suit was still pending until that month. I do not think that this amendment should have been insisted upon in the registry, as it is not in fact the husband's case. Mr. Temple has not

attempted to argue that in Oct., 1934, anything occurred which, of itself, could constitute desertion. He admits that the husband's case stands or falls on the allegation that he was deserted on Oct. 16, 1932, and that the legal effect of the previous proceedings must be considered in relation to that allegation. Accordingly, I granted his application at the hearing to re-amend the petition by restoring the original date, but without A requiring a second service of the petition.

I am bound to say that I have felt considerable doubt as to whether or not I ought to accept without further investigation the evidence of the husband as to the circumstances in which his wife left him in Oct., 1932. When I adjourned the case for the assistance of the King's Proctor, B it appears from the shorthand note that I emphasised the desirability of his being given a transcript of the earlier proceedings, because the facts brought out there might be very material to the question whether or not there was desertion before their institution, and that in turn might also be material to the present issue. In fact, because of the C great expense involved, only one or two very short extracts of the evidence and my judgment have been transcribed. Other counsel were engaged in the earlier trial, and I cannot pretend to have a detailed recollection of the case, except in so far as it is refreshed by the full note which I took of the evidence. Mr. Temple admitted that I was entitled—indeed, D he invited me—to refresh my recollection of the earlier evidence. Accordingly, I read the relevant passages from my note, so that they might appear upon the present shorthand note.

As regards the wife's cross-charges, it is unnecessary to say more than that they were based upon the allegation that the husband, according E to his own statement to the wife, had suffered from a venereal disease in 1927. This the husband denied, and there has been no plea for discretion, on the part of the husband, in either suit. Although the matter is not referred to in my judgment, my recollection is that the wife's cross-petition was not pursued, on the ground that, if adultery was to F be inferred from those facts, it must, obviously, have been condoned. As the disease was not communicated to the wife, there was no element of cruelty in this respect. However, the wife gave evidence that she had had a very unhappy married life from the first year of their marriage in 1914, that the husband was very cruel to her, that he often struck G her, that she had left him no less than 6 times, and that she left him in Oct., 1932, because she could no longer put up with his temper, which she said had been "terrible" on the night before she left. She made it clear, however, that she then intended to leave her husband finally, and that she did so without warning. The husband denied having struck H his wife, though he admitted that he had once given her a black eye, and said that she had issued a police court summons on one occasion when the court missionary had intervened, and that on two occasions she had gone home to her father. His case against the wife consisted in part of circumstantial evidence about an alleged miscarriage, which, on

investigation, was completely disposed of, and in part of direct evidence of the husband and his brother of their having watched on two occasions when they swore that they had seen the wife and the co-respondent together in a bedroom in circumstances of the most compromising character, from which, if believed, the court would almost have been bound to infer that adultery had been committed. The importance of recalling these details is that, in my judgment, I said, expressly, that I was not satisfied with the evidence of the husband, and still less with the evidence of his brother, and that I did accept the evidence of the wife that nothing of the kind described had, in fact, occurred. At the end of a very short judgment, I emphasised that I was not merely giving the wife and the co-respondent the benefit of the doubt, but that I was positively satisfied that no adultery had been committed at all. It is for this reason that I have hesitated in this petition to accept untested the evidence of the husband that he was the deserted spouse in 1932. The Solicitor-General told me that the King's Proctor had merely appeared under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 181 (1), to assist the court by argument, and that no directions had been obtained which would have entitled him to take any part in examining the petitioner under sect. 181 (2). At the same time, he informed me that, although the evidence to which I have referred had not been specifically considered, the King's Proctor's representative had interviewed the wife, and that he was instructed that the King's Proctor did not consider that there was any material to put before the court tending to contradict the husband's evidence that the wife had deserted him in 1932, though at the same time he reserved the right of the King's Proctor to take such steps as he might be directed to take under sect. 181 (2) if such material came to his notice later. It is quite clear that an argument by the King's Proctor under sect. 181 (1) does not preclude him from intervening subsequently under either of the other two subsections, but, in the circumstances of this particular case, as the Solicitor-General admitted, it would be difficult for him to assert, after a decree *nisi* had been granted, that anything arising from the evidence previously given could be regarded as a material fact which had not been brought before the court at this trial. Though I should have felt happier about my decision if the case had been contested, and if the husband had been cross-examined, nevertheless, on the evidence before me, I hold that the wife deserted the husband in Oct., 1932.

On this basis, there remains the question whether or not she continued to desert him without cause for the 3 years immediately preceding the presentation of the petition, notwithstanding the fact that in Mar., 1933, the husband presented a petition for divorce, in the prosecution of which he persisted until it was finally disposed of in Oct., 1934. The question may be formulated as being whether the original desertion is entirely terminated by the presentation of such a petition, or, at any rate, by its

effective prosecution (see *Gibbs-Smith v. Gibbs-Smith* (1)), so that it is a condition precedent to establishing a subsequent charge of desertion that cohabitation has been resumed and a new offence of desertion has been committed, or whether the true position is that during the prosecution of such proceedings the petitioner is precluded from asserting that a period of desertion continues to run, but that the original offence of desertion, though suspended, is not wiped out, and can be revived after the proceedings have been disposed of. The Solicitor-General also developed an argument to the effect that antecedent desertion was not affected, as a matter of law, by the prosecution of such proceedings, but that their effect depended upon the circumstances in which the proceedings were instituted, and upon the intentions of the parties. As he ultimately abandoned this argument, and admitted that the result of the decisions in *Kay v. Kay* (2) and *Stevenson v. Stevenson* (3) is that the petitioning spouse is, at the least, and as a matter of law, precluded from asserting that a period of desertion is running during the prosecution of his or her petition for divorce, and as Mr. Temple accepted this position, I need only say that I adhere to the reasons I gave in *Bush v. Bush* (4) for rejecting a precisely similar argument in that case, and following the decisions in *Marthews v. Marthews* (5) and *Walton v. Walton* (6).

Before I leave *Bush v. Bush* (4), however, I wish to say that it must not be thought that in that case I was encouraging the idea that the statutory period of 3 years immediately preceding the presentation of a petition could be obtained by ignoring the period during which previous proceedings were pending and by aggregating periods before and after that period. I had been pressed with a decision to that effect in *Johnson v. Johnson* (7), in which HODSON, J., distinguished *Stevenson v. Stevenson* (3) upon a construction of the Matrimonial Causes Act, 1937, s. 6, to which I was not prepared to assent. However, since, on any view of the case with which I was dealing, it was impossible to get a complete period of 3 years without including, as I was invited to do, the period during which the earlier petition was on the file, I was merely reserving the question whether or not an aggregation of two such periods could be justified by any other argument. I am convinced, however, by the argument in this case, though again it is unnecessary to the decision, that the words "has deserted the petitioner without cause for a period of at least 3 years immediately preceding the presentation of the petition" cannot be satisfied by aggregating with a period of less than 3 years immediately preceding the petition an earlier, but detached, period, of whatever duration. Moreover, I understand that in *Cohen v. Cohen* (8) HODSON, J., has recently given a decision to this effect.

Assuming, then, that the husband is precluded, as a matter of law, from asserting that the wife's desertion continued to run while he was prosecuting his former petition, can he nevertheless allege that, though the offence of desertion was not absolutely wiped out when he filed his petition in Mar., 1933, the wife's abstention from cohabitation could, to

quote words used by WARRINGTON, L.J., in *Thomas v. Thomas* (9), at p. 201, "continue to have the quality of desertion" when the period of suspension came to an end on the dismissal of the suit? The difficulty in the way of this contention lies in the well-known passage in the opinion of LORD PENZANCE in *Fitzgerald v. Fitzgerald* (10), at p. 698 :

- A But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, "desertion," in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of "desertion without cause."
- B Taken literally, this passage appears to lay down that, even if cohabitation originally ceased, as in this case, by the wrongful act of the wife, the husband, by taking what proved to be abortive proceedings, effectually prevented his wife from resuming cohabitation, whereupon it became impossible for him to allege desertion without a previous resumption of
- C cohabitation. I do not propose to analyse this passage, and that which precedes it sentence by sentence. The argument has shown that there is more than one phrase which, if read out of its context in strict application to the facts of the particular case, is at least disputable. It might, for example, be supposed that LORD PENZANCE was saying, in the penultimate line of p. 697, that a wife who left her husband "with good cause" was herself a deserter, unless the sentence is read in the light of his finding that, although her suspicions of the husband's infidelity were genuine, they were in fact unfounded. Likewise the opening sentence of the passage I have already quoted from p. 698 appears to need qualification, if it suggests
- E that desertion is impossible when cohabitation has already ceased to exist by the adverse act of the deserter. It has often been explained that this judgment was not intended to be, and cannot be, taken as an exhaustive exposition of the law relating to desertion: see, for example, *Mahoney v. M'Carthy* (11), at p. 25, *Pulford v. Pulford* (12), at p. 20, and
- F *Papadopoulos v. Papadopoulos* (13), at p. 114. Moreover, the industry of the Earl of Drogheda has brought to light the fact that the concluding words of the passage quoted must be qualified by the subsequent history of the spouses. It appears that, after a further rehearing, in which the Queen's Proctor had intervened at the request of the court, LORD
- G PENZANCE confirmed his first decision, and the petition was dismissed. Thereupon, in July, 1870, the wife made a formal demand through her solicitor for the resumption of cohabitation. This was disregarded, and, after the lapse of two years therefrom, a third petition was presented, in Oct, 1872, on the ground of the husband's adultery and desertion. The
- H Queen's Proctor intervened, and the facts as to the previous suits were laid before the court. However, SIR JAMES HANNEN held that both offences were proved, and granted the wife a decree of dissolution. The case is reported on the question whether the decree absolute could be accelerated, but the important fact that the allegation of desertion appears to have been based upon the husband's refusal of the wife's demand for the resumption

of cohabitation, and the subsequent lapse of two years, only appears in 43 L.J.P. & M., at p. 13, from which I have taken the above summary of the facts.

Desertion as a matrimonial offence is a creature of the Matrimonial Causes Act, 1857, but neither in that nor in any subsequent statute has it been defined. Judges have repeatedly declined to attempt an exhaustive definition. Indeed, the difficulties created by the passage which I have quoted from *Fitzgerald v. Fitzgerald* (10) illustrate the warning against making the attempt which is given by SIR H. E. DUKE, P., in *Jackson v. Jackson* (14), at p. 23. It is clear from the Act of 1857 itself that desertion was from the first regarded as existing independently of the period of its duration, for by sect. 21 "a wife deserted by her husband" might obtain protection of her property "at any time after such desertion," and, until the references to the Divorce Court in that section were repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, she could resort, not only to the justices, but also to the Divorce Court, for the purpose. It is, of course, true that, before the court can grant a decree, whether of divorce or of judicial separation, proof that desertion has lasted for the statutory period is, and always has been, necessary, except in the case of non-compliance with a decree for the restitution of conjugal rights, when proof of the lapse of 2 years was dispensed with under the Matrimonial Causes Act, 1884, s. 5, and under the corresponding provisions in the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 176, 185, now obsolete so far as divorce is concerned. Moreover, under the Summary Jurisdiction Acts, in which again there is no definition of the offence, a wife can obtain relief in respect of desertion without proving that it has lasted for any period at all. It seems to me to be equally clear that the offence exists under the Act of 1937 independently of its duration. Indeed, while imposing a new period as regards both divorce and judicial separation, the Act preserves, in relation to judicial separation, all the earlier provisions, including those dispensing with any period of desertion in the case of non-compliance with a decree for restitution of conjugal rights. In other words, the description of desertion given by SIR FRANCIS JEUNE, P., in *Frowd v. Frowd* (15) as "the cessation of cohabitation brought about by the fault or act of one of the parties," which was intended to be applicable both in courts of summary jurisdiction and in the Divorce Court, and to be independent of the lapse of any period, is, if not exhaustive, as true in relation to the present Act as it was in relation to the earlier Acts.

In my opinion, the true view of the matter is that the fact of the institution and prosecution of proceedings by the deserted spouse does not absolutely terminate the offence of desertion, but merely precludes him or her from asserting that a period of desertion runs during the pendency of those proceedings, and that, as a matter of law, the continued absence of the other spouse can reassume "the quality of desertion."

after the suspensory bar has been removed by the termination of the suit, although there has been no subsequent resumption of cohabitation. It must be conceded that there are passages in the judgment of GORRELL BARNES, J., in *Kay v. Kay* (2) which appear to be inconsistent with this view, at any rate in relation to a case of simple desertion unaccompanied

A by conduct on the part of the deserter which would justify the deserted spouse in refusing to resume cohabitation. However, it is important to bear in mind the circumstances to which the judge was addressing himself. The parties separated in July, 1900, and, less than 2 years afterwards—namely, in May, 1902—the wife filed a petition alleging

B cruelty and adultery. This was followed in Dec., 1903, by a supplemental petition alleging desertion for 2 years or upwards, a period which could not possibly be completed without including time which had elapsed after the filing of the original petition. Then, by later amendment, a further charge of adultery was added. All the charges of adultery and

C cruelty were held to be without foundation, but the jury found desertion from a date about 7 months after the separation and about 14 months before the filing of the original petition in circumstances from which the judge inferred that they had come to the conclusion that the separation itself was the fault of the wife rather than that of the husband. That

D really disposed of the finding of desertion from the later date, but he dealt, alternatively, with the point of law arising from the prosecution of the original petition. It is to be noted that, as the proceedings were only then being determined, the sole point was whether or not the petition had terminated the alleged desertion. No question of any subsequent

E revival of the desertion arose. It is evident that the judge regarded with disfavour the treatment by SIR JAMES HANNEN of the later *Fitzgerald* suit (10), in which, as in *Kay v. Kay* (2), the original separation was actually caused by the withdrawal of the wife. He declined—rightly, as was held in *Stevenson v. Stevenson* (3)—to follow other decisions

F discussed in his judgment, in which SIR JAMES HANNEN had allowed time subsequent to the institution of a suit to be reckoned as part of the period of a charge of desertion introduced by later amendment. However, at p. 394 and p. 396, he distinguished, with approval, the decision of

G SIR JAMES HANNEN, P., in *Knapp v. Knapp* (16), a case in which, within 2 years of the husband's desertion and elopement with another woman, the wife had filed a petition based on that adultery and on cruelty. This she subsequently abandoned, and, having waited for the full period of 2 years thereafter, during which time the husband continued to live in adultery, she filed a petition based on adultery and desertion, and obtained

H a decree. GORRELL BARNES, J., said, at p. 394, that the mere filing of the first petition at a time when, "apart from the question of desertion," the wife is in no way bound to go back to the husband, because of his living in adultery, will not stop the desertion running, but that :

. . . a different position arises when the circumstances are such that there is nothing intervening between the parties but the matter of desertion, which can be put an end to at once.

Then, at p. 396, he contrasts *Knapp v. Knapp* (16) with *Kay v. Kay* (2), saying that, though the husband's attitude of mind was presumed to be precisely the same throughout, the wife had practically put it out of his power to return by filing the petition and maintaining her charges from then up to the time when the judge was giving judgment. If the judge, in speaking of the desertion running right through from beginning to end, meant that the period could be reckoned as continuing throughout the time when the abandoned petition was on the file, that would be in conflict with the law declared in *Stevenson v. Stevenson* (3). If, however, as I think it must be, he meant that, although that time had to be excluded from the reckoning of the period, the husband was the deserter throughout, it seems to me to be immaterial whether a husband's intention to desert is manifested by conduct from which it is clear that he will never return or by conduct which entitles his wife to refuse to return. His attitude and intentions are irrelevant, so long as the wife is prosecuting her suit for divorce, and *vice versa*. Whether the institution of the suit prevents the old statutory period of 2 years from accruing, or its continuance to within 3 years of the presentation of a subsequent petition prevents the new one from beginning in time, there is an end of the matter. So also if, the suit being disposed of, the deserted seeks to make amends, and the other spouse has no ground for refusing to return to cohabitation: *Jones v. Newtown & Llanidloes Guardians* (17), at pp. 384, 385. If, however, it is established that the deserter's attitude of mind is unchanged throughout, I see no reason why the existence of the other spouse's obligation to resume cohabitation, if the deserter should happen to change his mind and repent, is sufficient, of itself, to negative desertion after a suit has been disposed of, any more than it would have been before its inception.

Though it is not directly in point, the decision in *Boulton v. Boulton* (18) supports the view which I have formed. It was held in that case that a period of desertion could begin to run again when, upon notice to the husband, the justices cancelled an earlier non-cohabitation order, based on a finding of desertion, and informed him that he was then at liberty to return to his wife, although no resumption of cohabitation followed. The fuller report of the argument in the Law Times reports shows that the decision of HORRIDGE, J., was based upon a consideration of, amongst other authorities, both *Fitzgerald v. Fitzgerald* (10) and *Kay v. Kay* (2). However, this does not mean that there is any presumption that the desertion survives the termination of the suit. The Solicitor-General referred me to the passage in *Bouron v. Bouron* (19) where SCRUTTON, L.J., said, at p. 195 :

The intention [to desert] is presumed to continue, unless the husband proves genuine repentance and sincere and reasonable attempts to get his wife back.

Those words, as the preceding sentence shows, were used in relation to a case of constructive desertion where there had been original cruelty on the part of the husband and an expressed intention to force his wife to

leave. However, though the same presumption has been invoked where the deserting spouse merely remained absent from the matrimonial home without excuse (*Sifton v. Sifton* (20)), I do not think that it can be relied on in a case where the petitioner is precluded by his own act from asserting that the desertion continues without interruption. Mr. Temple dis-

A claimed—rightly, as I think—any attempt to argue that, on the final disposal of the earlier proceedings, a fresh period of desertion accrued automatically.

On the other hand, I do not think that it can be laid down, as a matter of law, that it is a condition precedent to the revival or continuance of

B the original desertion after the earlier proceedings are disposed of, that some active steps have been taken by the petitioner towards bringing about a resumption of cohabitation. It is sufficient, in my opinion, to say that, the burden being always upon the petitioner to prove that a state of desertion has existed at the material time, it must depend upon

C the circumstances of the individual case whether or not it is necessary that the petitioner should take any, and, if so, what, steps to that end.

Mr. Temple argued that, although the husband had taken no such steps, there was positive evidence from which I ought to infer that the wife was still the deserting spouse, and that the period of her desertion

D ran afresh after the disposal of the former proceedings. He relied on the husband's evidence that the reason why he had not asked his wife to return was that he knew she would only sneer at him, and that this was justified by the fact that, on the first occasion when they had met accidentally, while he was driving his omnibus, she had poked her head out of the

E window of a car and laughed at him, and that on another occasion she had stood and jeered at him as he was driving past. The only other occasion when the husband had seen her was when she was served with the petition, when she had simply turned and walked away. With this Mr. Temple coupled the husband's evidence that, from first to last, since

F she left her husband, the wife has never claimed maintenance of any kind. This is corroborated by the court records, which show that there has been no claim for alimony in either suit. I think that these are matters which I am entitled to take into account in considering whether or not the wife's absence after the previous proceedings were disposed of "con-

G tinued to have the quality of desertion." For these reasons, although I think that, on the facts, the case is very close to the borderline, I find that the husband has proved his case, and I pronounce a decree *nisi*.

Decree nisi granted.

Solicitors: *Dehn & Lauderdale* (for the petitioner); *Treasury Solicitor*

H (for the King's Proctor).

[*Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.*]

NOTE.

The following is the judgment in the case of *Cohen v. Cohen*, referred to in the above case. The judgment was delivered by HODSON, J., on Jan. 18, 1939, the petition being one for dissolution of marriage founded on desertion.

H. B. D. Grazebrook for the petitioner.

HODSON, J.: The petitioner in this case, Mrs. Dorothy Gertrude Cohen, was married to her husband, Max Jacques Cohen, in 1921, and the only child of the marriage was born in Apr., 1923. Two years after the birth of the child, the wife was sent home to her mother by her husband in circumstances which amounted to desertion, and the husband has deserted her ever since. However, events which have happened since make it, in my view, quite impossible for me to hold that desertion has subsisted for 3 years immediately preceding the presentation of this petition.

The petitioner presented a petition for dissolution of marriage on Mar. 21, 1930, in which she alleged that her husband had been living with another woman for a period of about 6 months during 1929. The husband put in an answer to that petition, and nothing further was done. The petitioner says that she did not go on with it because she had not the means and because she could not find the woman. However, that petition remained on the file until it was dismissed on May 4, 1937, to make way for a further petition for dissolution of marriage, also on the ground of adultery, which the wife presented on May 25. I am told that that petition was served upon the respondent. There is no indication on the court file whether or not it was served. At any rate, no answer was put in, and the petition remained on the file till it was dismissed on Mar. 1, 1938, to make way for the present petition.

The circumstances are, therefore, that, between Mar. 21, 1930, and May 4, 1937, and between May 25, 1937, and Mar. 1, 1938, the petitioner had two petitions on the file, both of which had been served on the respondent, in which she was praying that her husband should be kept away from her, and, indeed, praying for the maximum relief to which she was entitled—namely, a dissolution of the marriage.

In those circumstances, I regret to say that I feel I am precluded by the decision of the Court of Appeal in *Stevenson v. Stevenson*, [1911] P. 191; 27 Digest 320, 2986, from granting the petitioner the relief she seeks. SIR H. H. COZENS-HARDY, M.R., says quite plainly, at p. 194: "The presentation of the petition and its continuance on the files of the court prevented the subsequent desertion from being without excuse. She was praying the court to require her husband to keep away." I am bound by that decision. I do not think that I can distinguish it from this case. I have been referred to a decision of SIR BOYD MERRIMAN, P., in *Bush v. Bush*, [1938] 4 All E.R. 598; Digest Supp., in which a somewhat similar proposition was argued, but without success. SIR BOYD MERRIMAN, P., also felt himself bound by the passage to which I have referred in *Stevenson v. Stevenson*, [1911] P. 191; 27 Digest 320, 2986. In *Bush v. Bush*, [1938] 4 All E.R. 598; Digest Supp., the judgment is concluded by a passage, at p. 601, to the effect that, as regards a suggestion that it was possible to add together a period of desertion occurring before an earlier petition and the period occurring after the dismissal of that petition, in order to make up the 3 years' period, that might have to be considered in due course in an appropriate case. Mr. Grazebrook argues in this case that the period of desertion of 3 years was complete before 1930 when the first petition was presented, and, indeed, had subsisted for 5 years then, and that there is no reason why one should not add together the necessary period when there was no petition on the file so as to make the 3 years run up to the moment immediately preceding the presentation of this petition. I confess that I feel myself quite unable to do that, and, having regard to the authority to which I have referred, I cannot see how it can possibly be said that the desertion runs up to the date of the presentation of this petition—namely, Mar. 2, 1938. In those circumstances, the petition must be dismissed.

Solicitors: *Percy Bono & Griffith* (for the petitioner).

MORSE v. MUIR.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge),
March 1, 2, 1939.]

Practice—Costs—Interest on costs—Order of Divorce Division—Costs to be paid by co-respondent—Further order for payment of costs by instalments—Judgments Act, 1838 (c. 110), s. 17—Matrimonial Causes Rules, 1937, r. 81.

The plaintiff had been the petitioner in a divorce suit wherein the present defendant was the co-respondent. On Dec. 23, 1924, SIR H. E. DUKE, P., made an order that the defendant should pay into court the amount of the plaintiff's taxed costs. That order was subsequently varied by an order made on Feb. 6, 1925, whereby the defendant was

ordered to pay the sum in question direct to the plaintiff. On Apr. 2, 1925, the judge in bankruptcy made an order that the defendant should pay the sum in question by monthly instalments, and these instalments were in fact duly paid. In the present action, the plaintiff claimed that he was entitled to be paid interest on the sum paid, on the ground that the order of SIR H. E. DUKE, P., was the equivalent of a judgment, and that, by virtue of the Judgments Act, 1838, s. 17, every judgment debt carries interest at 4 per cent. It was further contended that the order made by the judge in bankruptcy must be deemed to apply, not only to the amount due under the previous order, but also to interest on that sum:—

HELD: (i) the effect of the order by the judge in bankruptcy was to extinguish the original debt, which became replaced by the obligation to pay monthly instalments. As no instalment had been in arrear, no interest was payable.

(ii) there is authority for saying that an order made by the Divorce Division is not a judgment, and cannot be enforced by an action in the King's Bench Division, and that no action, therefore, lies in that Division to recover the principal sum, still less to recover any interest; but *quære* whether the Matrimonial Causes Rules, 1937, r. 81, has not altered the position.

[EDITORIAL NOTE.] In this case, the point was argued whether an order of the Divorce Court for costs is a judgment within the meaning of the Judgments Act, 1838. Having regard to the view that the judge took upon the other point, it was not really necessary to decide this, but, the matter having been argued, the judge has given his views upon the matter, and, upon the authorities, has come to the clear view that it is not a judgment within the meaning of the Act, but it will be remembered that the position of such orders has recently been altered by an amendment of the Rules of Court. The point upon which the case is decided is that an instalment order made upon a judgment summons extinguishes the original debt and creates a new liability—namely, that to pay the instalments as and when they fall due. There can therefore be no liability to pay any interest until such time as an instalment is in arrear.

AS TO JUDGMENT SUMMONSES IN DIVORCE MATTERS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 820, 821, paras. 1312-1314; and FOR CASES, see DIGEST, Vol. 30, pp. 172-175, Nos. 402-432.]

Cases referred to:

- (1) *Woodham Smith v. Edwards*, [1908] 2 K.B. 899; Digest, Practice, 635, 2672; 77 L.J.K.B. 1056; 99 L.T. 710.
- (2) *Aman v. Southern Ry. Co.*, [1926] 1 K.B. 59; 30 Digest 163, 331; 95 L.J.K.B. 58; 134 L.T. 9.
- (3) *Bailey v. Bailey* (1884), 13 Q.B.D. 855; 30 Digest 170, 386; 53 L.J.Q.B. 583; *aff.*, 50 L.T. 722.
- (4) *Re Binstead, Ex p. Dale*, [1893] 1 Q.B. 199; 30 Digest 125, 44; 62 L.J.Q.B. 207; 68 L.T. 31.
- (5) *Ivimey v. Ivimey*, [1908] 2 K.B. 260; 30 Digest 170, 384; 77 L.J.K.B. 714; 99 L.T. 75.
- (6) *Hutchinson v. Gillespie* (1856), 11 Exch. 798; 30 Digest 169, 377; 25 L.J.Ex. 103; 26 L.T.O.S. 275.
- (7) *Caudery v. Finnerty* (1892), 61 L.J.Q.B. 496; 30 Digest 174, 428; 66 L.T. 684.
- (8) *Norton v. Gregory* (1895), 73 L.T. 10; 30 Digest 169, 380.
- (9) *Seldon v. Wilde*, [1911] 1 K.B. 701; 30 Digest 169, 382; 80 L.J.K.B. 282, 104 L.T. 194.
- (10) *Montgomery & Co. v. De Bulmers*, [1898] 2 Q.B. 420; 5 Digest 1038, 848½; 67 L.J.Q.B. 768; 78 L.T. 671.

(11) *Morgan v. Rowlands* (1872), L.R. 7 Q.B. 493; 32 Digest 380, 627; 41 L.J.Q.B. 187; 26 L.T. 855.

(12) *Taylor v. Hollard*, [1902] 1 K.B. 676; 32 Digest 416, 940; 71 L.J.K.B. 278; 86 L.T. 228.

ACTION for interest alleged to be due on an amount of £1,478 18s. 11d., being the taxed costs of a divorce suit, which had been paid by the defendant to the plaintiff by monthly instalments of £10, pursuant to an order made on Apr. 2, 1925, by P. O. LAWRENCE, J., the judge in bankruptcy. The facts of the case are fully set out in the judgment.

George Pollock for the plaintiff.

S. Cope Morgan for the defendant.

Pollock: Whenever there is a final judgment of the High Court, that judgment carries interest, and is recoverable by an action. The Judgments Act, 1838, s. 17, provides that interest shall accrue on a judgment debt. Sect. 18 defines a judgment debt. By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 225, that is extended to include a decree of the divorce court. The order of SIR H. E. DUKE, P., dated Feb. 6, 1925, was given effect to in the bankruptcy court. Clearly the order of P. O. LAWRENCE, J., dated Apr. 2, 1925, was a judgment debt. Apart from a decree giving a purely equitable relief, or a county court judgment, an action will always lie: *Hutchinson v. Gillespie* (6). [Counsel referred to *Caudery v. Finnerty* (7).] If one can sue on any judgment of the High Court, which includes the sum awarded plus interest, then one can sue for interest alone. An order for alimony is not a final order, and, therefore, one cannot bring an action on it. One can sue on an order of the Probate Division: *Norton v. Gregory* (8). The meaning of "decrees in equity" is discussed in *Selton v. Wilde* (9). An action purely to recover the costs of a divorce action will not lie: *Ivimey v. Ivimey* (5), and R.S.C., Ord. 68, r. 1. The reason is that that would be suing merely for costs, and that is part of the action for divorce. This action is not that at all, but is one pursuant to the Judgments Act. Any order of a superior court which is a final order can now be sued on. Therefore it gives rise to a judgment debt. R.S.C., Ord. 42, r. 24, is of general application. R.S.C., Ord. 68, r. 1, must be examined to see what it takes out of the general rule. In any event, *Ivimey v. Ivimey* (5) has no application to the order of P. O. LAWRENCE, J. That is not excluded by R.S.C., Ord. 68, r. 1.

Morgan: If the judgment for the principal has gone as a result of the second order, any claim to interest has gone also: *Aman v. Southern Ry. Co.* (2). [Counsel referred to *Woodham Smith v. Edwards* (1) and *Montgomery & Co. v. De Bulmers* (10).] In *Caudery v. Finnerty* (7), the judgment was by consent. If the plaintiff is right in contending that this is a judgment debt due since 1924, there was no claim to it from 1925 till 1938, and so the claim is defeated by the lapse of the statutory period of 12 years, which applies to judgments: see the Real Property Limitation Act, 1874, s. 8, *Morgan v. Rowlands* (11) and *Taylor v.*

Hollard (12). If the plaintiff is right as to this order, this court has no jurisdiction. As this was not a final order, the matter should go back to the divorce court to obtain a final order.

Pollock, in reply : If interest was due under the order of SIR H. E. DUKE, P., the order of P. O. LAWRENCE, J., merely replaces that order, and in no way changes it. Where an order is silent as to interest, a judgment is nevertheless deemed to carry interest.

GODDARD, L.J. : For the information of the Court of Appeal, I may say that no oral evidence was necessary or has been called, and the only evidence that is before me consists of the evidence of certain orders to which I will refer in my judgment, and also a bundle of correspondence.

The action is brought by the plaintiff, who was formerly the petitioner in divorce proceedings against his wife and against the defendant, the co-respondent in those proceedings. The proceedings resulted in a decree in favour of the petitioner (the present plaintiff), and an order was made on Dec. 23, 1924, by SIR H. E. DUKE, P., ordering that the present defendant

... do within 7 days of the service of this order pay into court the sum of £1,478 18s. 11d., being the amount of the petitioner's costs taxed and certified by one of the registrars of this Division.

The reason why the money is ordered to be paid into court is, of course, well known. It is because, if the decree should be rescinded, the order against the co-respondent for costs would go, and they would be returned.

Then a later order was made on Feb. 6, 1925, varying that order, and ordering the co-respondent to pay to the petitioner direct that sum of money. As I understand the practice of the Division, the reason for a variation of the order is this. The petitioner wants to take some proceedings to enforce the payment of costs, in the shape of either a judgment summons or some other appropriate procedure, and he can only do so if he has an order that the money shall be paid to him, and so the court varies the order—I believe on an undertaking that the petitioner will either hold the money or himself bring it into court to secure it, so that, if the decree is rescinded, it may be returned. However that may be, there is the order of Feb. 6, 1925, ordering the sum of £1,478 18s. 11d. to be paid over to the petitioner. Directly he got that order, or very soon after he got it, he took proceedings by way of judgment summons under sect. 5 of the Debtors Act, and the matter came before the court in bankruptcy (as it did in those days, and until quite recently), and the judge in bankruptcy made an order, dated Apr. 2, 1925, under which he ordered that this sum of £1,478 18s. 11d., together with the costs of the judgment summons, should be paid by instalments at the rate of £10 per month.

The co-respondent (the present defendant) paid these instalments punctually—there is no question about that—and he has now paid the

whole of these instalments due under the order made on Apr. 2, 1925. However, the petitioner (the present plaintiff) now claims that he is entitled to interest on the amount of that money, and he sues for interest in this court. No question has been argued before me as to the amount of the interest, and I must assume that, if interest is payable, the amount is properly calculated, and that the amount he is claiming is the right one. A

The claim is certainly a novel one, and it is not suggested that there is any case in the books which covers it. In my opinion, the claim fails. Mr. Pollock, who has argued this case with great care, and has called my attention, I am sure, to all the relevant matters, puts his case thus. B The Judgments Act, 1838, s. 17, provides as follows :

That every judgment debt shall carry interest at the rate of £4 per cent. per annum from the time of entering up the judgment, or from the time of the commencement of this Act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. C

He says that the order of SIR H. E. DUKE, P., is equivalent to a judgment—a point to which I will refer later on, but for the present purposes I am assuming that it is—and that, therefore, the judgment of SIR H. E. DUKE, P., carried interest all along. Then he says, as I understand it, that, that being so, the order which the judge in D bankruptcy made on the judgment summons must be deemed to apply, not only to the amount that is stated in the order, but also to that amount plus interest. If that is so, I think that the difficulty which at once leaps to the eye is that he is not suing here for an instalment under the judgment summons order. He is suing for a lump sum of E interest which has accrued over this period. He is suing, not for certain instalments due under this order of £10 per month, but, as I say, for a lump sum.

So far as this court is concerned, in my opinion, this point is covered, really, by authority, because the effect of a judgment summons and F an order made on a judgment summons has been considered by the Court of Appeal in *Woodham Smith v. Edwards* (1). I might read from that case the judgment of BUCKLEY, L.J., as he then was, in which he said, at p. 905 :

On Dec. 21, 1905, the plaintiff Smith obtained judgment against the defendant G Edwards for £217 0s. 3d. The judgment debt was not paid and a committal summons [he means a judgment summons] was taken out by the plaintiff, and on Mar. 23, 1907, BIGHAM, J., sitting as judge in bankruptcy, made an order for the payment of the judgment debt by instalments of £4 a month, the first instalment to be paid on Apr. 23, 1907. In May, 1908, the defendant was in default as to 8 monthly instalments, and the plaintiff obtained a charging order nisi upon a sum of £75 H which had been paid into court in an action in which the defendant Edwards was plaintiff. RIDLEY, J., at chambers discharged the charging order nisi, and the plaintiff has appealed from his decision.

The order for the payment of the judgment debt by instalments was made under the Debtors Act, 1869, s. 5, and the result of that order having been made was that there was no longer a present debt of £217 0s. 3d. due from the defendant, but a debt accruing due by £4 a month. So far as the Debtors Act, 1869, is concerned there is nothing to prevent the issue of execution on the instalments as they fall due ; each instalment, if unpaid, is a debt on which execution can issue.

- I need not refer to the rest of the judgment, which deals with whether a charging order could be made. Reference in that case is made to the Execution Act, 1844, which provides that, if there has been an order for payment of money by instalments, execution upon such order shall not issue until after default in payment of some instalment, and then execution may issue either for the whole amount remaining due or for each successive instalment. In this case, however, it seems to me that the reasoning of BUCKLEY, L.J., applies, that the judgment debt of £1,478 18s. 11d. has gone, and that for that there has been substituted a debt accruing at the rate of £10 per month. Whether or not, if default be made in the payment of any one of those instalments, interest might run on one of those instalments is a matter that I need not consider, because that is not the ground on which this action has been brought. This action is brought to recover interest on the original judgment, and, there having been interposed the machinery which the plaintiff himself elected to adopt—namely, that of proceeding by way of judgment summons—it seems to me that the reasoning of BUCKLEY, L.J., applies and that that is really sufficient to dispose of this case. The original judgment debt has gone, and for that has been substituted a debt payable, not as a lump sum, but by instalments of £10 per month.
- D On this matter it is relevant to refer to a case which has been cited by Mr. Cope Morgan, *Aman v. Southern Ry. Co.* (2), in which the Court of Appeal pointed out that interest is merely the fruit of a tree, and that, if the tree has gone, the fruit goes with it. BANKES, L.J., said, at p. 72 :

E ... interest is nothing but the fruit of the judgment, and if the tree dies the fruit must die with it. The same thing applies to the claim for the costs of obtaining the judgment.

In the same case, SCRUTTON, L.J., said, at pp. 73, 74 :

F It appears to me that if the tree falls the fruit falls with it, and if the judgment is gone the incidents of the judgment are equally gone, including the statutory interest.

- I do not say that the judgment has gone, but the judgment debt, I think, in view of the decision in *Woodham Smith v. Edwards* (1), has gone, and another debt, payable by £10 per month, has been substituted for it. Therefore, I think that the short answer to the plaintiff's claim
- G is that, having elected to proceed by way of judgment summons, and having obtained the benefit of an order of that nature, which he could have enforced by application to the judge, if he could satisfy the judge that the debtor had the means and had not paid, he has taken his remedy, and there is no ground for saying that he can recover interest upon the
- H original judgment.

As I have already said, it is not necessary for me to decide in this case whether or not the plaintiff could recover interest on any unpaid instalment, because every instalment was properly paid, and I do not think that, in those circumstances, I can read this order, as Mr. Pollock has invited me to read it—namely, as being an order that he do pay £1,478 18s. 11d.,

with interest at the rate of £10 per month. In any circumstances, however, that is not what is being sought in this action. The plaintiff is not seeking to enforce the payment of an instalment due under that order. That is not what he is suing for, and, therefore, I think that the claim fails.

Another point has been argued in this case. It is a point of considerable interest, which it is not really necessary for me to decide, but, in deference to Mr. Pollock's argument, I will say a word about it. The question which arose was whether or not an order of the Divorce Court for costs is a judgment within the meaning of the Judgments Act, 1838, so as to carry interest. It is said that in books on practice it is stated that it does carry interest. If I had had to decide that point, I should have had great difficulty, in view of the decisions of the Court of Appeal, in holding that it was a judgment within the meaning of the Judgments Act. There is a long line of authority—at least a line of authority extending over a very considerable period—as to the effect of orders made in the Divorce Court, and as to how far they are equivalent to judgments, beginning, perhaps it is hardly necessary to say, with *Bailey v. Bailey* (3), and followed later by the Court of Appeal in *Re Binstead, Ex p. Dale* (4), in which an order of the Divorce Court with regard to payment of the petitioner's costs has been held not to be a final judgment for the purposes of the Bankruptcy Act. Finally, I think it is necessary also to refer to *Ivimey v. Ivimey* (5), in which the court said in terms that one could not sue in this Division or in any other Division of the High Court for the costs which the Divorce Division had ordered to be paid. The reason given by SIR H. H. COZENS-HARDY, M.R., for that decision was this, at pp. 263, 264 :

In the first place, this [the order] is not a judgment, it is a mere order, and it was the law before the Judicature Acts that, although you could bring an action on a judgment, you could not bring an action on an order of another court; but R.S.C., Ord. 42, r. 24, says that "every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." The effect of that is that for most purposes there is no difference between an order and a formal judgment in any case coming within that rule. I guard myself by saying that there may be a difference between an interlocutory order and a final order, but the mere fact that the court has made an order and not a judgment does not prevent the court from granting such remedy as it could formerly grant on a judgment. But that rule has no application whatever to the present case, because R.S.C., Ord. 68, r. 1, says: "Subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in" (*inter alia*) "proceedings for divorce or other matrimonial causes."

Then he refers later on to *Bailey v. Bailey* (3), to which I have just referred, and says, at pp. 264, 265 :

Bailey v. Bailey (3) is also, in my opinion, a strong authority to the same effect. It was there held that an order to sign final judgment under R.S.C., Ord. 14, could not be made in an action for arrears of alimony payable under an order of the Divorce Division. GROVE, J. decided that the action would not lie, on the ground that the order was an interlocutory order. The Court of Appeal affirmed his decision, but they put it on a larger and wider ground. LORD ESHER pointed out that the power to give alimony was conferred on a court which was constituted by the Matrimonial Causes Act, 1857, and that the remedy intended to be given

for disobedience to the orders of that court was to be found in sect. 52 of that statute, which provides for the enforcement of such orders in the same way as orders might be enforced in the Court of Chancery. It is quite true that that section has now been repealed by the Statute Law Revision Act, 1892, but that repeal is subject to the usual reservations contained in such Acts, and does not affect the remedies given by r. 179 to which I have already referred.

A Then LORD ESHER says this [p. 859]: "Would an action lie in a court of common law to enforce a decree of the Court of Chancery? Clearly it would not, at least under ordinary circumstances. There was always power to sue upon the judgment of a court of common law; but no promise could be implied at common law to obey a decree of the Court of Chancery; and therefore a remedy by action for disobedience to a decree of the Court of Chancery did not exist at common law, and a decree or order of the Divorce Division can be enforced only in the manner pointed out by sect. 52."

B This seems to me to show that the principle upon which the court was acting was that an order by the Divorce Division is not the equivalent of a judgment on which an action can be brought in this court, and, as the orders of the Divorce Division must be enforced by the appropriate steps, and under the rules of the Divorce Division, if one cannot sue
C on an order ordering the defendant to pay a sum for costs, it seems to me to follow as a matter of common sense, even apart from the judgment of the Court of Appeal in *Aman v. Southern Ry. Co.* (2), that one cannot sue for interest on those costs, and it would be absurd to say that, if the law prevents one from recovering the principal sum, the law will
D not prevent one from recovering interest on that sum. If the position is that an action will not lie for the principal sum, it seems to me to follow clearly that an action will not lie for interest on that sum. It seemed to me, when this case was being argued, that *Ivimey v. Ivimey* (5) was a conclusive authority against Mr. Pollock's contention.

E The Matrimonial Causes Rules, 1937, came into force on Jan. 1, 1938, and r. 81 provides as follows:

Subject to the provisions of these Rules and of any statute, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any matrimonial cause or matter to which these rules relate.

F It is not necessary for me to give a decided or conclusive opinion on this matter, but it may well be that R.S.C., Ord. 42, r. 24, now does apply to orders of the Divorce Division, and that they are accordingly put into the same position as that of judgments, and, if that is so, the particular objection which was taken in this case may no longer apply.
G For the reasons which I have already given, I think that Mr. Cope Morgan's point as to the effect of a judgment summons is a perfectly good one, and, accordingly, it is unnecessary for me to consider any question arising under the Statute of Limitations. Therefore, I give judgment for the defendant with costs.

H *Judgment for the defendant with costs.*

Solicitors: *Bolton, Jobson & Yate-Lee*, agents for *Bawtree & Sons*, Witham (for the plaintiff); *J. & P. J. F. Chapman-Walker* (for the defendant).

KINGSTON-UPON-HULL CORPORATION v. YUILLE.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), **March 13, 1939.**]

Water Supply—Domestic purposes—Trade or business—Supply to medical practitioner—Water used in mixing medicines supplied to patients—Kingston-upon-Hull Corporation Act, 1897 (c. ccxlix), s. 82—Kingston-upon-Hull Corporation Act, 1911 (c. lxxxvi), s. 39. A

The appellants were the undertakers for the public supply of water within the area prescribed by the Kingston-upon-Hull Corporation Act, 1897. The respondent was a medical practitioner residing in the district. He used his residence also as a surgery and dispensary, where he was visited by patients, to whom he supplied medicine as required. Water was laid on to both hot and cold taps in a part of the surgery which was partitioned off. It was admitted that the water was used for cleaning and disinfecting surgical instruments and similar articles, and for washing purposes. The water from the cold tap was used for household drinking purposes, and for diluting medicines. The corporation claimed that, in addition to the rate for domestic supply, the respondent was liable to a charge for the use of water for purposes other than domestic, as set out in a list of rates and charges issued by them under the head of "Miscellaneous Water Supplies: Minimum annual charges: Druggist or dispensary":— B

HELD: the water was used for a domestic purpose, within the meaning of the Kingston-upon-Hull Corporation Act, 1897, s. 82, and it made no difference that it was used in a dispensary or surgery in the course of the doctor's professional duties, either for diluting medicine or for washing his instruments. It was not a question of the quantity of water used. C D

[EDITORIAL NOTE.] The Court of Appeal has emphasised the point that the present case is decided only on the facts as stated at the conclusion of the judgment of SCOTT, L.J. It no doubt appears from this that the decision can therefore be only of limited application, but it would seem that those facts cover the case of any medical practitioner in ordinary private practice supplying medicines to his patients as an incident of that practice. The basis of the decision is that the purpose for which the water is to be used is the proper criterion, and the purpose here is drinking, which is a domestic purpose. E

AS TO DOMESTIC PURPOSES, see HALSBURY, 1st Edn., Vol. 28, Water Supply, pp. 299-303, paras. 552-556; and FOR CASES, see DIGEST, Vol. 43, pp. 1080-1082, Nos. 147-165. F

Cases referred to:

- (1) *Colley's Patents, Ltd. v. Metropolitan Water Board*, [1912] A.C. 24; 43 Digest 1081, 162; 81 L.J.K.B. 126; 105 L.T. 674; *affg.*, [1911] 2 K.B. 38. G
- (2) *Metropolitan Water Board v. Avery*, [1914] A.C. 118; 43 Digest 1080, 150; 83 L.J.K.B. 178; 109 L.T. 762; *affg.* [1914] 1 K.B. 221, C.A., and [1913] 2 K.B. 257.
- (3) *Pidgeon v. Great Yarmouth Waterworks Co.*, [1902] 1 K.B. 310; 43 Digest 1081, 155; 71 L.J.K.B. 61; 85 L.T. 632.
- (4) *Manchester Corpn. v. Buttle* (1929), *Times Newsp.*, July 3; 43 Digest 1082, 165. H

APPEAL by the plaintiffs from a decision of His Honour SIR REGINALD MITCHELL BANKS, K.C., sitting in the Kingston-upon-Hull County Court, dated Nov. 25, 1938. The facts and arguments are fully set out in the judgment of SCOTT, L.J.

The Kingston-upon-Hull Corporation Act, 1911, s. 39, provides as follows :

A The corporation may supply water for other purposes than domestic purposes on such terms and conditions as the corporation think fit, and may supply water by measure either for domestic or other purposes, and the moneys payable for the supply of water under this section shall be recoverable in the same manner as water rates. Provided always that no person shall be entitled to a supply of water for other than domestic purposes if such supply would interfere with the sufficiency of the supply of water for domestic purposes.

R. M. Montgomery, K.C., and E. J. Rimmer for the appellants.

Harold L. Murphy, K.C., and Norman Black for the respondent.

B *Montgomery, K.C.* : Making up medicines for sale is not a domestic purpose. The doctor is making something for which he is to be paid in some way. The distinction is that, where the patient has to add water, it is a domestic purpose, but, where the doctor adds the water to the mixture beforehand, then it is for professional purposes.

C *DU PARCQ, L.J.* : On the facts found, the doctor may have added water for the particular patient only.

Montgomery, K.C. : It is found that the doctor was carrying on a practice. [Counsel referred to *Colley's Patents, Ltd. v. Metropolitan Water Board* (1) and *Metropolitan Water Board v. Avery* (2).]

D *Rimmer* : There is no obligation on the corporation to supply any water for any purpose other than a domestic purpose. In making up medicine in such a form that it can be safely delivered to the patient, the doctor is performing a business purpose.

E *Murphy, K.C.* : The facts as found were that the water was used merely to dilute the medicine. The county court judge contrasted the practice of a druggist with that of the respondent. Pouring some water into a dose of medicine is a domestic purpose, even though it be done by the doctor for his patient. [Counsel referred to *Manchester Corpn. v. Buttle* (4).]

F *Montgomery, K.C., in reply* : The doctor here was carrying on a dispensary. It was a business, and the use of water was ancillary to it.

G *SCOTT, L.J.* : In this appeal, two interesting points are raised, first, as to whether or not a doctor who has attached to his surgery a dispensary where he dispenses medicines uses water supplied to him by the corporation in a way which entitles him to say that he uses it for domestic purposes, and, secondly, as to whether or not, when he washes his surgical instruments, he uses that water for domestic purposes. The whole question, of course, is primarily dependent upon the statutory provisions relating to the supply of water. In this case, the Kingston-upon-Hull Corporation sued a doctor in the county court for a small sum of money, which represented an assessment upon him of an additional charge not covered by the ordinary water rate. The ordinary rate covered all water used for domestic purposes, and the additional charge, which they fixed upon him under certain statutory provisions,



was for the water which they thought was used by him for non-domestic purposes. The small additional charge was at the rate of 9s. per annum. The important question raised by the case is as to whether or not a person in the position of a doctor dispensing his medicines is to be treated as different from the ordinary resident of a house, or a person who uses water for domestic purposes in an office, or, it may be, in a manufactory, on the ground that his use of the water is a non-domestic use. That question has been considered in several cases in the House of Lords. Therefore, in this case, we have the guidance of what was said in the House of Lords, and, in order to appreciate what has been said, it is necessary that I should refer to certain of the sections of the Acts that bear upon the question in Hull. A B

The main statute affecting Hull is the Kingston-upon-Hull Corporation Act, 1897, which incorporates the Waterworks Clauses Acts of 1847 and onwards. Under the Waterworks Clauses Act, 1847, s. 35, Parliament placed on the undertakers of a water supply a duty to supply, within the limits of their area, pure and wholesome water sufficient for the domestic use of all the inhabitants of the district, upon payment of a suitable water rate. Sect. 53 provided that every owner or occupier of a dwelling-house, or part of a house, within the limits of the special Act should be entitled, upon tendering the water rate, to demand and receive from the undertakers a sufficient supply of water for his domestic purposes. The Kingston-upon-Hull Corporation Act, 1897, s. 82, which throws a little additional light upon the phrase "domestic purposes," is expressed in these terms: C D

A supply of water for domestic purposes shall not include a supply of water for fixed baths horses cattle or washing carriages nor for any trade or business whatsoever nor for watering gardens nor for fountains nor for any ornamental purpose. E

The words "fixed baths" have been taken out of the Act, I think, by a subsequent amendment. The important phrases there are phrases like "a supply of water for cattle" and "for any trade or business whatsoever." Bearing that definition in mind for the light it may throw on the meaning of the phrase "for domestic purposes," we have to consider the facts of this case. I need not trouble with the details of the legislation in relation to additional charges for water supplied to a house for purposes other than its domestic purposes, because they are not in any way in issue between the parties. F G

The phrase "for domestic purposes" has been considered in a series of cases, but it is not necessary to go back to the earlier cases, because in 1912 and in 1914 the question was dealt with in the House of Lords. In *Colley's Patents, Ltd. v. Metropolitan Water Board* (1), the Metropolitan Water Board had a similar local Act, which had a section similar to sect. 82 which I have read, which purports to be, so to speak, a qualification of the widest conceivable use of the words "for domestic purposes" in the Metropolitan Water Board Act, 1907, s. 25. Water was supplied to a factory within the Metropolitan Water Board limits, and H D

was there used for drinking and washing purposes by the workmen employed at the factory, and for cleansing urinals and water-closets provided for the use of the workmen. No one resided on the premises. It was held that the board were entitled to charge for the water so supplied as for water supplied for domestic purposes upon the rateable

- A value of the factory, subject to the rebate allowed by the Act in the case of purely business premises. There it was to the advantage of the water board to be able to rate the factory for its supply of water for domestic purposes. The argument arose as to whether or not the supply was for domestic purposes, and EARL LOREBURN, L.C., said, at p. 31 :

Now, my Lords, I read sect. 25 [the definition section already referred to] as meaning that a supply for water closets and baths of the dimensions there mentioned is to be treated as a supply for domestic purposes. Even if it were not so, a supply for such purposes as exist in the present case is not a supply for purposes of "trade manufacture or business" at all. I think those words mean a supply for use in the trade, manufacture, or business.

I think that he means there for the purposes of a trade, manufacture or business. Then LORD SHAW OF DUNFERMLINE says, at p. 32 :

In my opinion the supply of water for domestic purposes is quite separate and distinct from the supply of water for use in trade or manufacture. That separation in fact is no doubt the reason for the separation in the rate. . . .

In the same case, LORD MERSEY says, at p. 32 :

The real question is whether water used for the mere personal convenience of men employed in a factory can be said to be water used for the purpose of the trade carried on in that factory.

- E The importance of that case is indirect, so far as the present appeal is concerned, and its value is negative—namely, that the fact that water is put to what I may call a domestic use in the course of business or trade operations does not prevent that use from being domestic. Thus, the mere fact that the doctor here was using the water in his surgery, and in the general course of his professional work, does not of itself dispose of the question we have to decide. The use itself, which is the criterion, may have been, so far as that aspect of the matter is concerned, either domestic or non-domestic.

- G After that case in 1912 in the House of Lords, another Metropolitan Water Board case found its way into and through all the courts—namely, *Metropolitan Water Board v. Avery* (2). The decision of the Court of Appeal was affirmed by the House of Lords, and I therefore want to refer to a passage in the Court of Appeal decision which was expressly approved. There the facts were that the licensee of a public-house within the district of the board was supplied with water in the ordinary way. In addition to the ordinary business of a public-house, he had there a catering business for people who came to lunch and did not reside there. The water board claimed to be entitled to make a small extra charge for the water so used in connection with these lunches—for cooking, washing up, and so on. It was held in the Court of Appeal that, as the use of the water

was in its nature domestic, the supply was for domestic purposes within the meaning of the Metropolitan Water Board Act, 1907, s. 25, and that the fact that the business of supplying lunches increased the quantity used made no difference. BUCKLEY, L.J., said, at p. 235 :

In the Divisional Court CHANNELL, J., in the course of his judgment said [p. 268] :
 " It is trade use of water, and not increase caused by trade of domestic use of water, A
 which is put by sect. 25 outside of domestic purposes."

That is the precise limit of the Metropolitan Water Board Act, 1907, s. 25, and the Kingston-upon-Hull Corporation Act, 1897, s. 82.

In the House of Lords, which affirmed the decision of the Court of Appeal, there are several passages in the opinions of the noble Lords which B
 have a direct bearing on that which is the essential question of the present appeal before us—namely, the criterion to apply for the purpose of deciding whether or not the use is a use for domestic purposes. LORD DUNEDIN, after referring to *Pigeon v. Great Yarmouth Waterworks Co.* (3), which was the case of a large boarding-house where it was held that, C
 although it was a business, yet the use of the water was for domestic purposes, goes on thus, at p. 124 :

It seems to me that there are just two alternative views left. Either the criterion is to see whether the purpose in connection with the trade is domestic or non-domestic in itself, the criterion adopted by the courts below and very clearly expressed in the judgments of BRAY, J., and BUCKLEY, L.J., or to say, as the appellants contend, that every use of water, however domestic in its nature, that appears as a step, however insignificant, in a trade operation is use of water for a trade and therefore non-domestic. . . . On the other hand, the test of the quality of the use in itself—so tersely put by BUCKLEY, L.J., " The test is not whether the water is consumed or used in the course of the trade, but whether the user of the water is in its nature domestic "—is not only easy of application, but is automatic in checking abuse. D
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Then LORD ATKINSON says, at pp. 126, 127 :

According to the ordinary meaning of language, I take it that water supplied for domestic purposes would mean water supplied to satisfy or help to satisfy the needs, or perform or help in performing the services, which, according to the ordinary habits of civilised life, are commonly satisfied and performed in people's homes, as distinguished from those needs and services which are satisfied or performed outside those homes, and are not connected with, nor incident to, the occupation of them. F

There LORD ATKINSON was obviously elaborating and explaining the meaning of the adjective " domestic." He goes on, at p. 127 :

It is plain from the provisions of sects. 7 and 8 of this statute [the Metropolitan Water Board Act, 1907] that it is the character of the purpose for which the water is supplied, and not the character of the premises to which it is supplied, that is the crucial consideration in determining whether the water is supplied for domestic purposes or not. G

Applying that here as I pass, the question is not whether the water was supplied for a surgery and dispensary, but whether the use of the H
 water so supplied was a use for a domestic purpose.

In those quotations that I have read, it is brought out quite clearly that the criterion to apply must be a consideration of the purpose for which the water is to be used. In my view, where water is added to medicine as a diluent for the purpose of drinking the medicine diluted

with water, that purpose is necessarily a domestic purpose. I can imagine no more domestic purpose than internal administration. If you drink a glass of water, you drink it for domestic purposes, and, if there is some medicine in it, you no less drink it for domestic purposes within the meaning of the relevant sections of these Acts. In some cases,

A it may be relevant to consider whether the purpose is immediate or ultimate, but, where the water is used for drinking—either as it is, pure, or with something else in it, be it medicine or be it whiskey—it seems to me quite plainly to come within the category of water used for domestic purposes. That, in my view, involves the dismissal of the
B appeal, so far as the water was used by the doctor for his dispensary. There is just the further addition that, in my view, no question of degree can enter in here. The amount of water used by a doctor in a dispensary cannot be very large in any event.

The other purpose for which the water was used here was merely for
C washing surgical instruments. Washing anything, cleaning anything, is *prima facie* a domestic purpose. To keep things clean is one of the most important objects of domestic life, and I can see no ground for saying that, because those things happen to be surgical instruments, when the doctor cleans them, he ceases to be using the water for a domestic
D purpose. The nature of the user is still domestic, even though the instruments are going to be used ultimately in the course of the doctor's professional practice. For those reasons, on the admissions of fact contained here, I think that the appeal must be dismissed. I merely state those admissions for the purpose of making them quite clear.

E It was admitted for the purpose of the litigation that the defendant, a medical practitioner, was occupying premises within the area of the plaintiffs' district as a residence, surgery and dispensary, and, further, that in his dispensary he had a hot and a cold tap. He used the supply from the hot tap for the purpose of washing his hands and for cleaning
F and disinfecting his surgical instruments and the like articles belonging to him. It is further said that he used the water from the cold tap for household cleaning purposes and for diluting medicines. Those are all the facts which are relevant to this appeal. Upon those facts, and upon the interpretation of the statutes as explained in the opinions of
G the House of Lords that I have read, this appeal must be dismissed with costs.

CLAUSON, L.J. : I agree.

DU PARCQ, L.J. : I also agree.

H *Appeal dismissed with costs. Leave to appeal to the House of Lords.*

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Alexander Pickard*, Town Clerk, Hull (for the appellants) ; *Le Brasseur & Oakley* (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

CLARKE v. BETHNAL GREEN BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Oliver, J.), **March 8, 1939.**]

Public Authorities—Local authority—Accident in swimming bath—Permissive power to provide swimming bath—"In pursuance . . . of any public duty or authority"—Solicitor and client costs—Public Authorities Protection Act, 1893 (c. 61), s. 1 (b)—Public Health (London) Act, 1936 (c. 50), s. 167. A

The defendant corporation was empowered, but not obliged, under the Public Health (London) Act, 1936, s. 167, to provide public swimming baths. In an action for damages for personal injuries alleged to have resulted from the negligence of the defendants in the management of their swimming baths, judgment was given for the defendants, on the ground of absence of evidence of negligence. It was thereupon contended that, in the circumstances of this case, the defendants were a "public authority" within the meaning of those words in the Public Authorities Protection Act, 1893, s. 1, and were entitled to costs as between solicitor and client:— B

HELD: the defendants in providing public swimming baths were acting in pursuance of a "public duty or authority" within the Public Authorities Protection Act, 1893, s. 1 (b), and, therefore, were entitled to costs as between solicitor and client. C

[EDITORIAL NOTE.] Although this matter arises upon a question of costs, the real question is whether a local authority providing a public swimming bath is a public authority within the meaning of those words as used in the Public Authorities Protection Act, 1893. There have been a number of cases on this question, recently and it is not easy to reconcile all of them. The present case, for example, seems to be a little inconsistent with the decision of *Hawkes v. Torquay Corpn.*, [1938] 4 All E.R. 16; Digest Supp. D

AS TO PUBLIC AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 293-297, paras. 611-616; and FOR CASES, see DIGEST, Vol. 38, pp. 106-112, Nos. 761-795.] E

Cases referred to:

- (1) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; *affg.*, [1915] 1 K.B. 417.
- (2) *Sharpington v. Fulham Guardians*, [1904] 2 Ch. 449; 38 Digest 109, 783; 73 L.J.Ch. 777; 91 L.T. 739. F

FURTHER CONSIDERATION of an action for damages for personal injuries arising out of the alleged negligence of the defendant corporation and/or their servant or agent in not properly supervising the behaviour of children using a swimming bath provided by the defendant corporation. The plaintiff, who was an infant, met with the accident in question while attending a women's session at the swimming baths kept by the defendants. The plaintiff was standing on the diving board at the deep end of the swimming bath, preparing to dive, when another child, underneath the springboard, hung on to the board and then let it go, so that the plaintiff was thrown against the edge of the bath and suffered injuries. His Lordship gave judgment for the defendants on the ground that, although it was a case in which there should have been supervision, the defendants had fulfilled their duty in providing one attendant, and there was no negligence on the part of the attendant, as she was standing in a position from which she had a general view of G
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the bath, and she was not bound to see a performance which affected two children out of fifty. Under the Public Health (London) Act, 1936, s. 167, the defendants were permitted, but not obliged, to provide swimming baths. Under the Public Authorities Protection Act, 1893, s. 1 (b), where an action is brought against any person "for any act
A done in pursuance or execution or intended execution of any Act of Parliament of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty or authority," and in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.

B *R. J. White* for the plaintiff.

F. Soskice for the defendants.

OLIVER, J.: In my opinion, this case does fall within the Public Authorities Protection Act, and, that being so, by reason of sect. 1 (b),
C the defendants, having succeeded, are entitled to costs to be taxed as between solicitor and client. The words to be interpreted are as follow :

For any act done in pursuance, or execution, or intended execution of any Act of Parliament or of any public duty or authority. . . .

D In my opinion, those words apply, then, to any person who is acting in pursuance, or under the protection, of an Act of Parliament, and they apply to him only if he is acting in pursuance of any public duty or authority, or any intended execution of such duty or authority. As I read *Bradford Corpn. v. Myers* (1), in all the opinions in the House of Lords in that case that distinction is maintained, and, of course, on the facts of
E that particular case, it was emphasised that it would be quite wrong to say that the protection should only apply to the case where a corporation is acting under the direction of a statute.

I hold, therefore, that the erection of a public bath for the use of people who, very likely, are unable to get proper means of washing and
F bathing in their own homes is an act done in pursuance of a public duty or authority. Since I have come to that conclusion, the decision I have given necessarily follows. It is not very easy to state the difference between cases of this sort and *Bradford Corpn. v. Myers* (1), in the House of Lords, and *Sharpington v. Fulham Guardians* (2),
G referred to there. I can see all the difference in the world between negligence taking place in a public swimming bath provided by the corporation for the use of all and sundry and negligence taking place in the delivery of a ton of coke, or in the execution of a contract by a builder. There will, therefore, be judgment for the
H defendants, with costs to be taxed as between solicitor and client.

Judgment for the defendants with costs.

Solicitors: *Daphnes* (for the plaintiff); *William Hurd & Sons* (for the defendants).

Re A DEBTOR (No. 1035 OF 1938).[CHANCERY DIVISION (Morton, J.), **February 27, 1939.**]

Bankruptcy—Administration in bankruptcy of estate of person dying insolvent—No personal representative—No power to order administration—Bankruptcy Act, 1914 (c. 59), s. 130—Bankruptcy Rules, 1915, rr. 302, 303.

The court has no power to make an order for the administration in bankruptcy of the estate of a deceased insolvent debtor before a legal personal representative of the deceased has been constituted.

[EDITORIAL NOTE.] It was argued in the present case that it would be a very convenient practice to make such an order in the absence of the legal personal representative, since it would save the expense of obtaining a grant to the estate of the deceased, and thus render further money available for the creditors, for whose benefit the order must, in any event, enure. The Court, however, felt bound by the terms of the statute to come to the conclusion that there was no power to make the order in such a case, and, therefore, no argument of convenience could prevail.

AS TO PETITION FOR ADMINISTRATION OF A DECEASED'S ESTATE IN BANKRUPTCY, see HALSBURY, Hailsham Edn., Vol. 2, pp. 131-134, paras. 166-169; and FOR CASES, see DIGEST, Vol. 4, pp. 501-505, Nos. 4509-4559.]

Case referred to :

- (1) *Re Sleet, Ex p. Sleet*, [1894] 2 Q.B. 797; 4 Digest 501, 4512; 63 L.J.Q.B. 750; 71 L.T. 381.

PETITION by the creditors of a deceased debtor for the administration of the estate in bankruptcy. The debtor's will had not been proved, and no letters of administration had been taken out. The registrar refused the order on the ground that, by reason of the wording of the Bankruptcy Act, 1914, s. 130 (2), and the Bankruptcy Rules, 1915, r. 303, he had no power to make such an order. He referred the matter to the judge.

P. B. Morle for the petitioning creditors.

MORTON, J. : In this case, the question is whether or not the court has jurisdiction to order the administration in bankruptcy of a deceased debtor's estate before any legal personal representative of the debtor has been constituted. The Bankruptcy Act, 1914, s. 130 (1), provides as follows :

Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against the debtor, had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy.

Subject. (2) of that section provides as follows :

Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the court may, in the prescribed manner, upon proof of the petitioner's debt, unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shown, dismiss the petition with or without costs.

Prima facie, it would appear that under sect. 130 (2) the jurisdiction of the court to make the order arises only on the prescribed notice being given to the legal personal representative of the deceased debtor. Had

the matter stopped there, there would have been no doubt that the court lacks jurisdiction to do that which Mr. Morle asks it to do in the present case, where, at the moment, there is no legal personal representative of the deceased debtor. Sect. 130 (3) of the Act provides as follows :

- A A petition for administration under this section shall not be presented to the court after proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate, but that court may, when satisfied that the estate is insufficient to pay its debts, transfer the proceedings to the court exercising jurisdiction in bankruptcy, and thereupon the last-mentioned court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor.

In this case, no proceedings have been commenced in any other court for the administration of the deceased debtor's estate. By sect. 130 (4) it is provided as follows :

- C Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the court, as trustee thereof, and he shall forthwith proceed to realise and distribute it in accordance with the provisions of this Act.

Then follows a proviso which is here immaterial. Reference has also been made to sect. 130 (6), which provides as follows :

- D In the administration of the property of the deceased debtor under an order of administration, the official receiver or trustee shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate, and such claims shall be deemed a preferential debt under the order, and shall, notwithstanding anything to the contrary in the provisions of this Act relating to the priority of other debts, be payable in full, out of the debtor's estate, in priority to all other debts.

- E There is some indication, to put the matter no higher than that, in that subsection that it is contemplated that there will be a legal personal representative in existence. Sect. 130 (7), which contains another reference to the legal personal representative, provides as follows :

- F If, on the administration of a deceased debtor's estate, any surplus remains in the hands of the official receiver or trustee, after payment in full of all the debts due from the debtor, together with the costs of the administration and interest as provided by this Act in case of bankruptcy, such surplus shall be paid over to the legal personal representative of the deceased debtor's estate, or dealt with in such other manner as may be prescribed.

- G Again, that subsection seems to me to indicate that there is contemplated the existence of a legal personal representative, to whom the surplus is to be paid. Sect. 130 (8) provides as follows :

- H Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the official receiver or trustee ; save as aforesaid nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration.

Sect. 130 (9) gives to the legal personal representative power to present

A petition for the administration of the estate of a deceased debtor under this section . . .

Were it not for the rules, to which I shall now refer, it would seem plain that, on the construction of the section, the court cannot order the administration in bankruptcy until a legal personal representative has been constituted. I have been referred to the Bankruptcy Rules, 1915, rr. 299-303. Rule 301 (1) provides as follows :

The petition shall, unless the court otherwise directs, be served on each executor who has proved the will, or, as the case may be, on each person who has taken out letters of administration. The court may also, if the court thinks fit, order the petition to be served on any other person.

In my view, that rule does not in any way indicate that the order can be made where no legal personal representative has been constituted. It appears to me to be directed merely to giving the court power to direct, if it thinks fit, that the petition need not be served on each of a number of executors or of those who have taken out letters of administration. The Bankruptcy Rules, 1915, r. 302, provides as follows :

When an administration order under sect. 130 of the Act has been made it shall be the duty of the executor or legal personal representative of the deceased debtor to lodge with the Official Receiver forthwith (in duplicate) an account of the dealings with, and administration of (if any) the deceased's estate by such executor or legal personal representative, and such executor or legal personal representative shall also furnish forthwith in duplicate a list of the creditors, and a statement of the assets and liabilities, and such other particulars of the affairs of the deceased as may be required by the Official Receiver . . .

By that rule, a duty is placed on the executor or legal personal representative of the deceased when an administration order has been made. Again, so far as I have read, I should find it difficult to reconcile the section and the rules with the fact that the court has power to make an order in the absence of a legal personal representative.

Mr. Morle very properly relied on r. 303, which provides as follows :

In any case in which an administration order under sect. 130 of the Act has been made, and it appears to the court, on the report of the Official Receiver, that no executor or legal personal representative exists, the account, list, and statement mentioned in the last preceding rule shall be made, verified, and lodged by such person as in the opinion of the court, upon such report, may have taken upon himself the administration of, or may otherwise have intermeddled with, the property of the deceased, or any part thereof.

Mr. Morle argues that this rule indicates very strongly that the court can make an order although no executor or legal personal representative exists. It does so indicate to some extent, I agree, but, in my opinion, it is not sufficient to establish the proposition for which Mr. Morle contends. One can reconcile the rule with the section perfectly well by reading the rule as being directed to a case where there was an executor or legal personal representative in existence at the date of the making of the order but such executor or legal personal representative had died after the date of the making of the order. In such circumstances, there is this useful rule whereby the account, list, and statement—which in the ordinary way would be delivered by the legal personal representative—may be delivered by a person who has intermeddled with the estate. In my opinion, to read the rule in any other way would be to read it in a manner directly contrary to the particular provisions of the statute, and, in particular, to sect. 130 (2), to which I have already referred.

It has been urged on me by Mr. Morle that, from a business point of view, it would be extremely convenient, and would save a great deal of expense, which in many cases serves no very useful purpose, if the Act had the meaning for which he contends. That may very well be so, but, if there is any good reason why power should be given to the court to make an order for administration in bankruptcy before a legal personal representative has been constituted, that matter is one for the legislature, and not for the court. I have to construe the section as it stands, and I cannot give it the construction for which Mr. Morle contends. I have been referred to the earlier sections which correspond with sect. 130—namely, the Bankruptcy Act, 1883, s. 125, as amended by the Bankruptcy Act, 1890, s. 21. All I can say is that, in referring to these Acts and to *Re Sleet, Ex p. Sleet* (1), I can find nothing to lead me to the conclusion that the *prima facie* view which I have formed on the construction of sect. 130 is incorrect. Therefore, on the point of law brought before the court, I hold that, at the moment, and until a legal personal representative has been constituted, there is no power to make an order for the administration in bankruptcy.

Petition referred back to chambers to stand over until a legal personal representative constituted. Costs of application to be costs in the petition.

Solicitors: *Boyce, Evans & Sheppard* (for the petitioning creditors).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

CLARK v. CLARK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
February 28, March 1, 2, 3, 1939.]

Divorce—Evidence Adultery—Birth of child—Period of gestation—Period of 174 days.

In a petition by a husband for divorce on the ground of the wife's adultery, there was no evidence of misconduct on the part of the wife, and the only evidence of adultery was the fact of the birth of a child the period of gestation of which, assuming the husband to be the father, could not have exceeded 174 days. The child lived, and, at the date of the hearing, was about 3 years old. The medical evidence was to the effect that a child of so short a period of foetal life would not survive for more than a day or two. At the same time, the medical witnesses agreed that only rarely could the date of conception be fixed, and that the periods of gestation generally spoken of were notional periods:—

HELD: (i) the husband had not discharged the burden of proof in respect of the adultery, and it was sufficiently proved that the child was conceived in wedlock.

(ii) where the date of conception can be fixed, and the actual period of gestation is ascertained, this ascertained period is comparable to the longer notional period, and for this reason what is in fact a six-months child may be comparable to what is called a seven-months child.

[EDITORIAL NOTE.] Generally speaking, the cases dealing with the period of gestation are concerned with the maximum period possible, and not with the minimum. The present case deals fully with the medical evidence, which would

now be usual in a case of this kind, and is of great value in showing that the period spoken of by medical witnesses is a notional period rather than an actual period, since in general the actual date of conception cannot be stated with accuracy. Thus, in certain cases, as much as one month has to be added to the actual period to obtain the notional period, and the latter is the period usually spoken of in practice as the foetal life of the child.

AS TO PROOF OF ADULTERY BY BIRTH OF CHILD, see HALSBURY, Hailsham A Edn., Vol. 10, pp. 663, 664, para. 976; and FOR CASES, see DIGEST, Vol. 27, pp. 297-299, Nos. 2743-2755.]

Case referred to :

- (1) *Russell v. Russell*, [1924] A.C. 687; 27 Digest 297, 2743; 93 L.J.P. 97; 131 L.T. 482.

PETITION by husband for dissolution of marriage on the ground of his wife's adultery. The husband relied solely upon the fact that the wife had given birth to a child of whom he alleged that he could not be the father. The wife denied adultery, and pleaded that the child was lawful issue of the marriage, the child having been born prematurely 6 months after the date of its conception. C

T. J. Kelly for the petitioner.

R. J. A. Temple for the respondent.

SIR BOYD MERRIMAN, P. : This is, I think, quite the most remarkable case that I have had to deal with since I have sat here. It is a petition by a husband against his wife, based on the charge of adultery, and that charge is avowedly based simply and solely on the fact that, on Feb. 10, 1936, the wife gave birth to a child, and that, if the husband was in fact the father, it is common ground that the earliest possible date on which conception could have taken place was Aug. 20, 1935. The two dates are in fact 174 days apart—that is to say, 6 lunar months and 6 days, or 24 weeks and 6 days. D

There is not a shred of evidence of any sort or kind—either given by the husband or elicited in cross-examination of the wife, or any of her witnesses—that the wife was conducting a love affair, or indeed any sort of association, with any man, known or unknown. On the contrary, she has called witnesses describing the sort of life that she was leading at the material time. She has called her sisters who were living in the house with her. Not one question was addressed, either to the wife or to either of those young women, to show that she was misconducting herself in any way. The case stands or falls absolutely and entirely on what I am asked to find is a law of nature—namely, that the child Patricia, having survived birth, and being in fact alive at this moment, some 3 years after her birth, cannot possibly be the child of the husband, because the maximum period of foetal life was 174 days. Amongst other authorities, I have been referred to that well-known textbook, TAYLOR'S PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE, 9th Edn., Vol. 2, p. 46 : F G H

It would be in the highest degree unjust to impute illegitimacy to offspring, or a want of chastity to parents, merely from the fact of a six-months child being born

living and surviving its birth. There are, indeed, no justifiable medical grounds for adopting such an opinion—a fact clearly brought out by a question put to Campbell, the chief medical witness [in a case details of which are given]. In his examination-in-chief he admitted that he himself had seen the case of a six-months child who had survived for several days. He then was required to say whether he could assign any reason why, if after such a period of gestation it is possible to prolong life for days, it should not be possible to extend it to months. He could give no satisfactory reply.

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The author then goes on to amplify the great danger of injury to parties from any such rash presumption by citing yet another case. I could, of course, dispose of this case on that passage, and I find it difficult really to understand how, in face of an authority like that, it is possible to

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assert as a matter of law, or a matter of nature, that I am bound to find that this husband is not the father, and that, therefore, the wife must have been guilty of adultery. However, I am not prepared to dispose of the case merely on the burden of proof.

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I have listened very carefully to all the evidence, medical and otherwise, given about this particular baby, and, as I have come to a perfectly definite conclusion on the matter, I think it only fair to both parties (I should perhaps have added to all parties, because the infant child is involved in this) that I should express the opinion which I have formed.

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In the further and better particulars of this case, delivered 11 months, or very nearly 11 months, after the birth of the child—which, incidentally, must have been living meanwhile quite close to the husband's family, and could have been seen at any time by them or on their behalf—it is alleged that, on Feb. 10, 1936, the wife gave birth to a fully-

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developed nine-months child. If there is one fact in this case about which it is utterly impossible to have any dispute on the evidence as it now is, it is that allegation, which is simply grotesque. So far from this child being a fully-developed nine-months child, the experienced midwife, Nurse Fry, who gave evidence, and to whose devotion, coupled with that

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of the wife's mother and the wife herself, the life of this child is due, said that this and one other child, in her experience lasting in all well over 30 years, were the two most extreme cases of premature birth that she had ever seen. The other case, she said, was one in Barnes before the War. She had never seen anything like this child on any other occasion,

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although naturally, in the course of her profession, she is constantly seeing children born prematurely.

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I do not propose to go through all the details of the evidence about that. The wife's mother saw the baby about 1½ hours after birth. She described her as a tiny shrivelled doll, the lower limbs absolutely like sticks. The colour, the lower part of the body being the worst, looked as if the child were bruised all over. There were no nails, and the body was covered with down. The evidence of the wife, who had been allowed to see the child some few days later, was to the same effect. As I say, it is simply fantastic to describe this child as a fully-developed nine-months child, or for the husband and those who have advised him—in

this case, his family—to put forward such an allegation, or to base any conclusions on any such assumption, without investigation, because they could perfectly well have ascertained what the position about this child really was. However, when all that has been said, there still remains the question on which Mr. Kelly has so forcibly relied—namely, whether it is possible—assuming everything, assuming that this child was an extreme premature—that the child could have been conceived as late as Aug. 20, 1935. A

I must explain in a sentence or two how it comes about that it is so certain that that is the maximum period of conception, or the maximum period of foetal life, or the earliest date of conception. It is common ground that, on Aug. 19, 1935, after a prolonged absence (and I am basing this finding upon evidence which does not conflict with the rule in *Russell v. Russell* (1)), the husband was in Venezuela or on the way home, and it is common ground that it was on the night of Aug. 20 that he and his wife, at that time, first slept together and had sexual intercourse. That date is fixed beyond the slightest possibility of doubt. It is one of the important features of this case that that date is a fixed, and not a speculative date, but, before I leave it, there is an aspect of the matter with which I must deal. The husband's case is as stated in the same particulars—namely, that, although he did stay with the wife on one night, which is the night to which I have referred, he did not further cohabit with her throughout that period. Those particulars are verified by the solicitor on affidavit. I did not allow Mr. Temple to pursue the matter beyond illustrating, as the affidavit states, that he has conduct of the matter on behalf of his firm, which acts for the petitioner, who is at present in Venezuela, being aware of the facts, and making this affidavit on his behalf. Objection was quite rightly taken that the only person who could waive privilege in regard to the instructions he had actually given to his solicitor was not here to deal with the matter, and for that reason I did not allow Mr. Temple to pursue the matter. However, somebody gave the solicitor those instructions, and I am quite satisfied that they are as inaccurate as is this allegation about the age of the child. I have had evidence from the wife, and from her family, and it has been corroborated by photographs, that, so far from the husband and wife having cohabited on this one night only, they spent the next 10 days together at Littlehampton, and, with the exception of a certain number of nights when the husband stayed at the shop which he was trying to get rid of, during his leave he and his wife slept together in the same bed in the wife's mother's house, and were seen in bed together. I have not the slightest doubt whatever that, though the relations were strained between them, the intercourse that admittedly took place on Aug. 20 was very far from being an isolated occasion. I say that, not only because I believe the wife, and those who have given evidence on her behalf about it, but because of the correspondence. In that correspondence the husband makes an allegation, which indeed was pressed against B
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the wife in cross-examination, that she was unduly anxious to obtain, and succeeded in obtaining, one act of sexual intercourse on the night of his return because she knew she was already pregnant. The foundation for that goes when I know for certain that, so far from that being an isolated act, it was only the first of a series of similar occurrences, which is exactly what one would expect after a husband and wife who have been parted for some time come together again. I do not think that there is the slightest foundation for the suggestion that the wife was anxious to have sexual intercourse for some ulterior motive on the night when her husband and she came together again.

The case really depends upon the evidence given by Dr. Roques, a gynæcologist of unquestioned standing, whose qualifications I need not rehearse. He gave his evidence in a way which made it quite clear to me that he was expressing a perfectly honest opinion, and there is not the slightest reason whatever for not treating that evidence as given in the very best possible faith. He stated in evidence-in-chief, and adhered in cross-examination to the statement, that it was impossible that a child born 174 days after intercourse could survive, though it might make feeble movements, or even cry. He said that such a child would weigh at the outside 2 lbs., but almost certainly less, and that it would be only 12 ins. long or thereabouts.

It is one of the misfortunes in connection with this case that, notwithstanding the devoted care to which I have alluded already, the keeping of records has not been up to the standard which would be adopted at the Middlesex Hospital. It is quite certain that Nurse Fry's methods of measurement differ from the accepted method, inasmuch as she measures from the forehead to the toe, whereas the accepted method appears to be to measure from the back of the head to the heel. Moreover, although a record was kept of the weight— $3\frac{1}{2}$ lbs.—4 days after the birth, and there had been no material change of weight in the time, it is only quite a short time ago that Nurse Fry mentioned to the wife that of course that included the towel. Obviously it did, because one could not weigh a baby on a hook-balance without putting it into something—whether it was a towel or a sheet, or whatever it might be—but it never appears to have occurred to anybody until quite a short time ago that somehow or other they must arrive at what the weight of the towel was. I am told it was a bath-towel, that it was identified, and that it weighed 1 lb., so that the $3\frac{1}{2}$ lbs. becomes $2\frac{1}{2}$ lbs. However, the whole of that record-taking, as I say, is a little sketchy, though, at any rate, it does make it clear that this child was not quite so insignificant as the type of infant that Dr. Roques was describing, because she did in fact weigh at least $2\frac{1}{2}$ lbs. at birth. I may say at once that I do not propose to go through all the technical details given by the various witnesses, though it must not be assumed that I have not read them and re-read them, and got them clearly in my mind. Dr. Roques went on to say that, in his view, the earliest age at which a child was viable, or, putting it the other

way, the shortest period of foetal life which, speaking generally, would produce a viable child, was 28 weeks, or 7 lunar months, and he added, as is unquestionably the fact, that, before that age, they are not considered notifiable by law, but are regarded as miscarriages. At the same time, he did admit that the features described by Nurse Fry, to some of which I have alluded, were features of premature birth, and, although, **A** true to the system adopted at his hospital, he expressed the advantages of incubators, he did admit that the diet given by Nurse Fry and under her direction—sugar and water, and a little brandy at first, and eventually mother's milk, fed every hour to the child through a spoon or a pipette—was the proper method of treatment. He emphasised the **B** extreme importance of careful nursing, and I have already said that I am satisfied that it was of the most devoted character.

There is no dispute whatever that, for this child to have survived until the age of 3 years, even giving a margin of 2 or 3 weeks in her favour, is a very remarkable thing. Dr. Morgan, a woman doctor of very considerable **C** experience during the last 10 years, particularly in regard to premature births, admitted without any qualification whatever that she would not accept that it was impossible. She said that that was much too dogmatic, and that on at least three occasions she had had abortions born at 24 weeks which had lived for 24 hours, but that in every case the child weighed **D** under 2 lbs. It is quite clear, as all the doctors agree, that the heavier the child in these very low regions of weights, the better chance it has of surviving, and everybody also agreed that, if one could get the child over the first week or so, and get it feeding, the chances of survival increased. I do not think that there was any controversy about those **E** facts. The result was that, on the evidence of experts—and I include amongst them Dr. Johnson, although he did not pose as an obstetrical expert, who had taken the trouble to look up and verify the details of the various cases which are cited in the textbooks—to put it at its very lowest, in the case of a foetal period of 174 days, the child's chances of survival **F** were very remote.

Then we come to what I think is one of the important features in dealing with the medical evidence. I confess that it was not until rather late in the evidence that I appreciated how important this factor was, and it was for that reason, so that there should be no misapprehension **G** about it, that I asked Dr. Roques to come back, after the other doctors had given their evidence, in order to deal with the point, and he dealt with it perfectly frankly. All the doctors agree—and of course everybody knows, apart from medical evidence—that, in the ordinary case, it is almost impossible to ascertain with any sort of certainty on what **H** date conception actually takes place. I am not saying that there may not be cases, particularly in cases of unmarried people, where the date can be obtained with practical certainty, but that is the exception rather than the rule. In the ordinary case of married people, it is really a matter of rule of thumb, and, although not invariably so, most of the

tables and the statistics are based upon what is really, when one analyses it, a notional period. The doctors agree, and indeed it is obvious, that what matters is, not the date of the intercourse which in fact results in conception, but the date when the foetal life begins—in other words, when the fertilisation takes place. That is the fact which it is almost

- A impossible in the ordinary case to ascertain, but, of course, it is the only fact that matters, so far as nature is concerned. Therefore, in the ordinary case, as Dr. Roques said, in the absence of any better intimation, the medical profession have to reckon from an artificial date—namely, the date of the last menstrual period. That date, as Dr. Roques said, is
- B unlikely to be the real date of conception or fertilisation, and, indeed, it is unlikely that any of the seven days of that period would be so either. The actual conception would probably take place at any time up to the date when the next period is due to begin. It follows from that, as Dr. Roques admitted, that, in a case where one can only take this notional
- C method of calculation, a child born on the one-hundred-and-ninety-sixth day—that is, at the twenty-eighth week, or seventh lunar month, from the notional starting-point—might very well be conceived quite normally in fact on the twenty-second day from the starting-point—the notional starting-point—that is to say, some 6 days before the next period is due
- D to start, and that, in a case which would be regarded, on the usual methods of calculation, as a 196-days case, or a seven-months child, the period of time would in fact be 174 days, or exactly this case. There is another way of testing it which produces almost exactly the same result. May I say, before I come to that, that that does not involve, as Mr. Kelly
- E seemed to think, that the actual conception in this case took place before Aug. 20. It only involves that, when one is dealing with a very exceptional case, in which one has an absolute date fixed as the earliest possible date, one can compare that case with the cases in the textbooks only by reducing them to the same terms—in other words, comparing like with
- F like—and that is what I have just endeavoured to do in the calculations, which Dr. Roques admitted had been correctly made and to which he said there was no answer. Now test it the other way. It is also common ground between the doctors that, though anything in the nature of a proper period after conception has taken place is most unlikely, if not
- G impossible, it is quite common for women to have an imperfect and incomplete period after conception. Assuming, for the sake of argument, that, in this case, conception did take place on Aug. 20, it is the evidence of the wife that the next day she had some sort of bleeding. She was not prepared to say that it was a period, perfect or imperfect.
- H It was certainly not perfect, because at that time she said that her periods were all very irregular and imperfect. She never had what she called a proper period. However, assuming, for the sake of argument, that that bleeding was something in the nature of a period, and that that period, so-called, more or less corresponded in point of time with the one in the previous month, it would then follow that the previous period

occurred 26 or 27 days before the ascertained date of conception—namely, Aug. 20—on the usual notional reckoning, as Mr. Kelly admits, that would give a notional foetal life of some 200 days, as compared with the actual foetal life of 174 days. Comparing like with like, it is not necessarily the case, but it may very well be the case, that this child, whose foetal life cannot have exceeded 174 days, may nevertheless be comparable with any of the cases met with in private practice, in the hospitals, and in the textbooks, which are recorded as having a notional foetal life of over 190 days, or even up to 200 days. Therefore, when one reduces the actual facts of this case to the same terms as those upon which the theories and the tables are based, it is utterly impossible to say that there is anything extravagantly improbable about this being a viable child.

There are one or two other points in connection with this to which I ought to refer to show that I have not forgotten them, although, as I say, I cannot go over all the details. This premature birth—this extremely premature birth, as it unquestionably was—I do not think there is any doubt whatever, was brought about by an accident within the preceding 48 hours. The wife described it as a very nasty fall indeed, and Nurse Fry corroborated it in her evidence, because she said that, at the time of the confinement, she found bruises on the wife's hip. It is quite obvious, from one casual piece of evidence (and very often these casual pieces of evidence are almost as important as is the evidence to which more formal thought has been given), that the wife was taken by surprise, because the mother mentioned incidentally that the child was wrapped up in flannel—in the flannels which the wife was engaged in making in expectation of the confinement, but which were not anything like ready. Having regard to the fact, which cannot be disputed, that we have here a rare combination of the extreme premature—I do not mean literally the extreme premature, but an extremely premature child with a fixed, and not a notional, maximum length of the foetal life—I am quite satisfied that there is no ground whatever for saying that this child is illegitimate. As I have already said, for the reasons I have given, which I could amplify if necessary, it is quite plain that, according to medical reckonings, though not in actual fact, this child is the equivalent, or may be the equivalent, of what would commonly be described or reckoned as a seven-months baby, though the actual foetal life cannot exceed 6 months and 6 days. For these reasons, I am not merely not prepared to find that the husband has discharged the burden of proof, but, having listened very carefully to the wife, and to her witnesses' description of the child, whose lower limbs are still in irons, and in particular having regard to the wife's demeanour as a witness, I am satisfied that she is telling me the truth. This child was conceived in wedlock, and, having come to that conclusion, I think that it is only right that I should say so, and not treat the matter merely from the point of view of a doubt, although, as I have already said, it would be

utterly impossible, in my view, to find the affirmative against her on the evidence which is before me.

Solicitors: *Barlow & Co.* (for the petitioner); *George C. Carter & Co.* (for the respondent).

[*Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.*]

CLAY v. LONDON COUNTY COUNCIL.

[CHANCERY DIVISION (Simonds, J.), **February 14, 15, March 1, 1939.**]

Local Government—Superannuation of officers—Transferred officers—Officer transferred in 1930—Whether “in the service on July 28, 1925”—Poor Law Officers’ Superannuation Act, 1896 (c. 50)—Local Government Act, 1929 (c. 17), ss. 119, 124.

The plaintiff entered the service of the S. Board of Guardians as a poor law officer in 1895, and remained there until 1930, when, under the provisions of the Local Government Act, 1929, s. 119, he was transferred to, and became an officer of, the defendant council. While in the service of the S. Board of Guardians, he made the annual contributions required by the Poor Law Officers’ Superannuation Act, 1896, but, not having elected, under the Local Government Act, 1929, s. 124, within 3 months after being transferred to the defendant council, to remain subject to the Act of 1896, he became subject to the council’s superannuation scheme, as amended under the provisions of the Local Government Act, 1929, s. 124 (2) (b). This scheme, which was deemed to have come into operation on July 28, 1925, provided, *inter alia*, by cl. 15 (2), that contributors should be entitled to a pension after having attained the age of 60 years and completed 40 years with the council. There was a proviso to cl. 15 to the effect that: “In the case of a contributor who was in the service on July 28, 1925, the lump sum payable on retirement shall be increased by $\frac{1}{2}$ per cent. for each year of contribution completed at that date.” The amending scheme for the case of transferred officers provided that the council’s superannuation scheme should apply to every transferred officer while in the service of the council, subject to the modification (*inter alia*) that any service prior to the appointed day which would have been treated as service for the purposes of the Act of 1896 should be treated as service in respect of which he had contributed to the fund. The plaintiff duly made his contributions under the council’s scheme, as amended, until he voluntarily retired in 1938, having reached the age of 64 years and having completed more than 40 years’ service with the council and the S. Board of Guardians. It was not disputed that he was entitled to a pension, but the question arose whether he was a contributor who was “in the service on July 28, 1925,” and, therefore, also entitled to the extra $\frac{1}{2}$ per cent. in accordance with the proviso to cl. 15. The plaintiff contended that, as the words “service under the council” in cl. 15 (2), included previous service, then similar words elsewhere in the scheme must be construed to have a similar meaning:—

HELD: the words “in the service on July 28, 1925,” plainly meant in the service of the council, and there was no sufficient context to justify their being given some other meaning.

[EDITORIAL NOTE.] In the present case, it was sought to base the benefits to a transferred officer under a superannuation scheme, not only upon his period of service after transfer, but also upon the period before transfer. A scheme of this kind, like a statute, has to be construed according to the words used, and the

present case shows that the meaning of the words used will not be extended unless the context clearly requires such extension.

AS TO SUPERANNUATION, see HALSBURY, Hailsham Edn., Vol. 21, pp. 77-80, paras. 136, 137; and FOR CASES, see DIGEST, Supp., Poor Law, Nos. 105a-105d.]

ACTION claiming a declaration as to the construction of certain words in the defendants' superannuation scheme. The plaintiff claimed that the words "in the service on July 28, 1925," should be interpreted to include service with another local authority from which he was transferred under the Local Government Act, 1929, s. 119.

R. F. Roxburgh, K.C., and *Andrew Clark* for the plaintiff.

C. E. Harman, K.C., and *Moelwyn Hughes* for the defendants.

SIMONDS, J. : The facts of this case are not in dispute, nor is any question of law involved. The question is solely one of construction of the particular documents, but it is, I am told, of importance to a large number of persons besides the plaintiff, whose rights will depend upon the meaning I attribute to the documents.

The plaintiff was born on Aug. 22, 1874. On June 24, 1895, he entered the service of the Shoreditch Board of Guardians as a poor law officer, and remained in that service until Apr. 1, 1930, when, under the provisions of the Local Government Act, 1929, s. 119, he was transferred to, and became an officer of, the defendant council. He remained in their service until Mar. 31, 1938, when he voluntarily retired, being then in his sixty-fourth year and having completed more than 40 years of service with the defendant council and the Shoreditch Board of Guardians. The latter body was a poor law authority within the meaning of the 1929 Act. From Sept. 29, 1896, to Apr. 1, 1930 (the date of his transfer), the plaintiff had made only the annual contributions required by the Poor Law Officers' Superannuation Act, 1896. His position in regard to pension rights upon transfer was governed by sect. 124 of the 1929 Act. He could, if he chose, within 3 months after transfer give notice in writing to the defendant council that he elected to remain subject to the Act of 1896. If he did not do so, then, since the defendant council had not adopted the Local Government and Other Officers' Superannuation Act, but had established a superannuation scheme under their private Acts, he would become subject to that superannuation scheme as amended under the provisions of the Local Government Act, 1929, s. 124 (2) (b), which provides as follows :

In the case of officers transferred to the service of a council who have not, on or before the appointed day, adopted the Act of 1922 but who have on that date some other superannuation scheme, the council shall prepare and submit to the Minister an amending scheme for applying the superannuation scheme to those officers while in that service and for adequately protecting their rights and interests, and upon the amending scheme being approved by the Minister, with or without modifications, the superannuation scheme shall have effect as thereby amended.

The defendant council's superannuation scheme, which has throughout been referred to as the 1929 scheme, since it was in 1929 that, in its final form, it received the approval of the defendant council, provided,

- by cl. 1, that it should be deemed to have come into operation on July 28, 1925. Clause 2 defined the liability to make contributions to the fund thereby established. Clause 3 contained a large number of exemptions from that liability. Clause 4 provided that persons otherwise exempted might be authorised to contribute to the fund. Clause 15
- A prescribed the superannuation allowances, and, under it, every contributor, having satisfied certain conditions, including contribution to the fund for 10 years or upwards, whose employment under the council is terminated by reason of (i) his retirement, voluntary or compulsory, after having attained the age of 65 years, (ii) his voluntary retirement
- B after having attained the age of 60 years and completed 40 years with the council, or (iii) for the other reason therein mentioned, becomes entitled, upon the termination of his service, to receive by instalments as therein mentioned during the remainder of his life a pension equal to $\frac{1}{10}$ of his average salary or wages and emoluments (if any) upon which
- C he has contributed to the fund during the last 5 years of actual contribution preceding his retirement or during the whole period of his service (whichever average be the greater) for each year of contribution up to a maximum of $\frac{4}{10}$ of such average amount, together with a lump sum to be calculated at the rate of $\frac{1}{30}$ of such average salary or wages and
- D emoluments for each year of contribution up to a maximum of $\frac{4}{10}$ of such average amount. The same clause has a number of provisos. Proviso (a) deals with the person whose service is terminated by reason of his infirmity, proviso (b) makes special provision for the case of an officer admitted to the council's service at an age later than the normal,
- E and proviso (c) provides as follows :

In the case of a contributor who was in the service on July 28, 1925, the lump sum payable on retirement shall be increased by $\frac{1}{2}$ per cent. for each year of contribution completed at that date.

- Proviso (d) provides that, in the event of a contributor being retained
- F in the service after his attaining the age of 65 years, the lump sum payable on retirement shall be reduced as therein mentioned. Finally, the clause contains a proviso—which I mention only because the defendant council appeared to attach some importance to it—to the effect that nothing therein contained shall prejudice or take away
- G the right of a contributor who has attained the age of 60 years and has been employed by the defendant council or its predecessors for a period of 40 years to retire and receive any pension or lump sum to which he might be entitled under that clause, although he might not have been a contributor for 40 years. I pause to observe that, where the words
- H “in the service” occur in provisos (c) and (d), they can only mean in the service of the defendant council, though that is not expressed. Clause 17 of the scheme made provision for the case of transfer of an officer of the defendant council to another appointment with a public authority. I need not refer to any other clause.

This being the defendant council's 1929 scheme, it became incumbent

on them to submit to the Minister of Health an amending scheme for applying it to the transferred officers, including the plaintiff. This they duly did, and it is upon the true meaning and effect of the amending scheme, read in conjunction with the 1929 scheme, that the dispute between the parties turns. The amending scheme, as modified and approved by the Minister, by cl. 1 defined a "transferred officer" as : A

... an officer or servant of a poor law authority by whom the annual contributions required by the Act of 1896 have been made, who by virtue of the Act of 1929 is transferred to the council, and who does not within 3 months after the appointed day give notice in writing to the council that he elects to remain subject to the provisions of the Act of 1896.

By cl. 2, the scheme provided as follows : B

The superannuation scheme [the scheme of 1929] shall apply to every transferred officer while in the service of the council, subject to the following modifications :— (1) Any service prior to the appointed day which would have been treated as service for the purposes of the Act of 1896 shall be treated as service in respect of which he has contributed to the fund. (2) Contributions paid under the Act of 1896 (except so far as those contributions are attributable to service in respect of which the officer is not transferred to the council by virtue of the Act of 1929) shall be C treated as having been paid to the fund.

There are numerous other modifications to which it is unnecessary to refer. A memorandum, to which was annexed a copy of the amending scheme, was issued to transferred officers including the plaintiff, and, with many others, he signed a form by which, *inter alia*, he declared that he desired to contribute to the 1929 scheme in accordance with the amending scheme. He duly made his contributions until his voluntary retirement on Mar. 31, 1938. No question arose as to his right to a pension, nor as to the amount of it, nor as to his right to a lump sum payable in accordance with the provisions of the body of cl. 15 of the 1929 scheme. The single question is whether he became entitled also to the extra $\frac{1}{2}$ per cent. provided by proviso (c) to that clause. Was he, within the meaning of that clause, a contributor who was "in the service on July 28, 1925" ? The plaintiff says that he was, and the defendant council say that he was not. It is clear, I think, that the modification imposed by the amending scheme would not require me, and, indeed, would not entitle me, to read "service" in proviso (c) as including any service other than that of the defendant council if the word "service" did not occur elsewhere in the 1929 scheme, and if it did not elsewhere have to be construed in the light of those modifications. Conspicuously the amending scheme does not provide that the service of the local authority from which the transferred officer is transferred is to be deemed to be the service of the council. I was, however, pressed with the argument that, unless I treat the words "service of the council," or "service," as including, in the case of a transferred officer, previous service of some other local authority, except where the context excludes that meaning, the purpose of the amending scheme will be frustrated, and, in particular, the plaintiff will not be entitled under cl. 15 (2) to the pension to which the defendant council admit his title, for that clause, it is said, confers pension rights only on contributors who retire, having attained the age D E F G H

of 60 years and having completed 40 years' service under the council. If, so the argument goes, service under the council does not include the previous service, then the plaintiff is not entitled to the pension to which the council concede his title. However, if, in sect. 15 (2), service under the council does include previous service, then surely elsewhere in

A the 1929 scheme, construed in the light of the amending scheme, similar words must have a similar meaning. This argument is countered by the defendant council in a number of ways. In the first place, they contend that the pension rights of the plaintiff are determined, not by the amending scheme, but by the memorandum to which I have referred.

B This contention appears to me to have no substance at all. It is clear, in my judgment, that the plaintiff's rights are founded on the 1929 scheme as applied by the amending scheme, and on nothing else. In the second place, they deny the plaintiff's premise that his right to the pension, if it arises under the scheme, depends on sect. 15 (2). Rather, they say,

C it arises under the final proviso to that section which I have read. This contention also, in my judgment, is ill-founded. The proviso in question does not create a right, but merely provides that an existing right (if any) shall not be prejudiced or taken away. It is plain, then, that the plaintiff's right to a pension is founded on cl. 15 (2) of the 1929 scheme.

D Does it follow, then, as the plaintiff contends, that the words in cl. 15 (c)—"in the service on July 28, 1925"—must be interpreted, by virtue of the modification imposed by the amending scheme, as meaning, in the case of a transferred officer, "service of any local authority which would be treated as service in respect of which the transferred officer had contributed to the fund"? The defendant council contend—and in this contention I think they are right—that there is no necessity and no justification for such an interpretation. It must be admitted, I think, that the modifications imposed by the amending scheme are not wholly apt, when read in conjunction with cl. 15 (2), to create the pension rights

F which the plaintiff claims and the defendant council admit. Nevertheless, I find no difficulty, after a consideration both of the scheme and of the amending scheme as a whole, in construing a period of service with or under the defendant council as including any period of service prior to transfer which would be treated as service in respect of which a contributor had contributed to the fund. If it were not so, the amending scheme would fail in its avowed purpose of applying the 1929 scheme to transferred officers, who would be left, as it appears to me, without any pension rights.

G It is otherwise when I am invited to say that a reference to service of the defendant council on a particular day must necessarily include service

H of some other authority by which the transferred officer was then employed. The date in question is in fact, as I have already mentioned, the date upon which, under cl. 1, the 1929 scheme is deemed to have come into operation. I admitted evidence, not to indicate the intention of the framers of the scheme in regard to cl. 15 (c), but to show that, in the circumstances surrounding its establishment, there was a class of persons to

which that proviso had a particular application. However, apart from this evidence, which had little or no weight with me, I see no reason for adopting a construction which is clearly not the natural meaning of the words—that is, of cl. 15 (c)—read in conjunction with the modifications, and is not necessitated by the context. It may well be that, if the attention of the defendant council had been called to this specific point, they might, by this amending scheme, have introduced modifications to make it clear that “service,” where it appeared in the 1929 scheme, should be construed as including, if the context admitted, previous service with another authority. Equally, however, it may well be that they would have introduced words to make it even more clear than it is that the words “in the service on July 28, 1925,” in cl. 15 (c) refer to service with the defendant council, and nothing else. Upon this I cannot speculate. It is sufficient to say that the natural meaning of the words is plain enough, and that there is no sufficient context to justify me in giving them some other meaning. The action, accordingly, will be dismissed, with costs.

Action dismissed with costs.

Solicitors: *J. M. McDonnell, Jackson & Co.* (for the plaintiff); *J. R. Howard Roberts* (for the defendants).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

WESTMINSTER BANK, LTD. v. ATTORNEY-GENERAL.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.),
January 20, March 6, 1939.

Applied. *Re* BRASSEY'S DEED
TRUSTS. [1951] 2 All E.R. 353.

Estate and Other Duties—Property deemed to pass—Income to be accumulated during life of deceased, followed by settlement of fund taking effect on death—Interest in property passing—Aggregation—Finance Act, 1894 (c. 30), ss. 1, 2 (1) (d), 4.

The deceased settled certain policies and investments upon trusts under which the income therefrom was to be accumulated for a period of 21 years or until the death of the deceased, whichever should be the shorter. In fact, the deceased died within the 21 years, and the trust funds were then to be held in trust for such of the children of G. born in the lifetime of the deceased as should attain 21 or marry under that age for their respective lives, and each child was given a general power of appointment over his or her share, and, in default of appointment, the capital was to belong to the children of such child:—

HELD: (i) following *Re Hodson's Settlement, Brookes v. A.-G.* (1), the originally settled funds and accumulations fund were property passing on the death of the deceased within the meaning of the Finance Act, 1894, s. 1, since there was a change in the beneficial possession of the property, the children then taking interest in possession and the children's children then losing a right to have accruing income added to capital for their ultimate benefit, and such fund was to be aggregated with other property passing on the death of the deceased for the purpose of fixing the rate of estate duty.

(ii) as to the policy moneys, the interests provided by the deceased were the life interests arising on his death, and estate duty on the value of those life interests was payable, and they ought to be aggregated with other property passing on the death of the deceased.

[EDITORIAL NOTE.] In the main, the decision herein follows on the one point the recent decision of the Court of Appeal in *Re Hodson's Settlement, Brookes v. A.-G.* (1), and, upon the other, that of the House of Lords in *Tennant v. Lord Advocate* (2). The matter is, however, carried a step further by the consideration of what is the property deemed to pass on the death of the deceased. This is decided to be, not the whole capital value of the policy moneys, but only the value of the life interests arising on that death.

AS TO INTERESTS ARISING ON DEATH, see HALSBURY, Hailsham Edn., Vol. 13, p. 242, para. 233; and FOR CASES, see DIGEST, Vol. 21, pp. 15, 16, Nos. 73-80.]

Cases referred to:

(1) *Re Hodson's Settlement, Brookes v. A.-G.*, [1938] 3 All E.R. 341; Digest Supp.; on appeal, [1939] 1 All E.R. 196.

(2) *Tennant v. Lord Advocate*, [1939] 1 All E.R. 672; Digest Supp.

APPEAL by the Crown from an order of FARWELL, J., dated May 25, 1938. The facts are fully set out in the judgment of the court delivered by CLAUSON, L.J.

J. H. Stamp for the appellant.

L. W. Byrne for the respondents.

CLAUSON, L.J. [delivering the judgment of the court]: In this case, the facts are as follow. By a settlement dated Jan. 27, 1926, Sir Frederick Macmillan, who died on June 1, 1936, settled certain policies on his life and certain investments upon trusts under which the income from the investments was to be accumulated for a period of 21 years from the date of the settlement or during Sir Frederick's lifetime, whichever should be shorter. In the event, which has happened, of Sir Frederick dying within the period of 21 years, the policies, the investments and the accumulations fund were to be held in trust to pay the income to such of the children of Mrs. Van der Goes born in the lifetime of Sir Frederick as should attain 21 years of age or marry under that age for their respective lives, and each such child was given a general testamentary power of appointment over the capital of his or her share, and in default of appointment the capital was to belong to the children of such child. By a later settlement, dated Oct. 23, 1930, Sir Frederick settled a further fund upon corresponding trusts, burdened, however, with certain life annuities arising upon Sir Frederick's death in favour of certain named persons. At Sir Frederick's death, there were several children of Mrs. Van der Goes in existence, some of whom had, and some of whom had not, attained vested life interests. All the annuitants survived him. On his death, the policies became payable, together with various bonuses, some of which had been declared as reversionary bonuses before the date of the settlement, and some of which had been so declared after the date of the settlement.

Treating this case as covered by his decision in *Re Hodson's Settlement, Brookes v. A.-G.* (1), FARWELL, J., held that there was no passing under sect. 1 on Sir Frederick's death of either the policy moneys, the originally settled funds, or the accumulations fund. In our judgment, the

reasons which led us to hold that the accumulations fund in *Re Hodson's Settlement, Brookes v. A.-G.* (1) passed under Finance Act, 1894, s. 1, on the settlor's death must lead to the same conclusion as regards the originally settled funds and the accumulations fund in question in this case, setting aside for the moment any question as regards the policies. Previous to their mother's death, the children of Mrs. Van der Goes had an interest in the income of these funds, since they had a right to have that income accumulated so as to provide an accumulated fund the fruit of which would come to them, and the children of those children had a corresponding right to have it accumulated so as to provide an accumulated fund the capital of which would, in default of appointment to the contrary, come to them. However, a clear change in the beneficial possession of the property as a whole took place on Sir Frederick's death. Not only did the life interests of the children of Mrs. Van der Goes become interests in possession, but also the interests of the next generation (children of the children of Mrs. Van der Goes) were changed, in that the accruing income was no longer to be rolled up for their benefit as an addition to capital, but the right to this income passed to their respective parents for their respective lives. Accordingly, in our judgment, on Sir Frederick's death, estate duty became payable on these various funds under sect. 1. The reasons which we have given for aggregation in the previous case of *Re Hodson's Settlement, Brookes v. A.-G.* (1) are applicable to these funds, omitting for the moment the question of aggregation in respect of the policy moneys.

In regard to the policy moneys, the Crown does not now claim that there was any "passing" under sect. 1. The Crown is content in regard to them to accept as correct the decision of FARWELL, J., embodied in his order, and, accordingly, to accept the view that duty is payable in respect of policy moneys under sect. 2 (1) (d) upon the principal value of the life interests which arise, upon the death of Sir Frederick, in the policy moneys. The Crown, however, claims that the decision of FARWELL, J., against aggregation is wrong, not only in so far as relates to the aggregation of the investments and the accumulations (on which point, as we have already said, our decision in *Re Hodson's Settlement, Brookes v. A.-G.* (1) covers the matter), but also in so far as relates to the aggregation of that which is deemed in respect of the policy moneys to pass on the death of Sir Frederick under sect. 2 (1) (d), and this is the only question arising in the present case which is not directly covered by our decision in *Re Hodson's Settlement, Brookes v. A.-G.* (1).

The first step is to ascertain with precision what it is that is deemed to pass, on the death of Sir Frederick, in respect of the policy moneys by reason of the operation of sect. 2 (1) (d). The answer is in the words of the subsection :

... [the] interest ... provided by the deceased ... to the extent of the beneficial interest accruing or arising ... on the death of the deceased.

The interest provided by the deceased is the amount of the policy moneys, including the bonuses. It is not, however, the whole of that sum which is deemed to pass. That sum is deemed to pass only to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case, the extent of the beneficial interest so arising is commensurate with the life interests which spring into being on the death of Sir Frederick—that is to say, the life interests, whether vested or contingent, on attaining 21 or marrying, of the 5 children of Mrs. Van der Goes living at the testator's death. It follows that that which passes in respect of the policy moneys is so much thereof as is equivalent to the value of those life interests therein.

The next step is to apply sect. 4 to the case. From that section, it follows that the last-mentioned value is to be aggregated with other property passing on the death, subject to the proviso that it will not be aggregated if it can be predicated of it that Sir Frederick never had an interest in it. In the reasons which we gave for our judgment in *Hodson's case* (1), we indicated our view that it is not possible to predicate of policy moneys paid in respect of a policy at one time belonging to A.B. that A.B. never had any interest in them. Since the conclusion of the arguments in the present case, the point has been concluded by the decision of the House of Lords in *Tennant v. Lord Advocate* (2). It follows that it cannot be predicated of this sum, forming, as it does, a part of the policy moneys paid upon policies belonging to, and settled by, Sir Frederick, that he never had any interest in it. It results that, in our view, the Crown's claim that this sum should be aggregated is correct. FARWELL, J., appears to have reached the contrary conclusion by holding that the beneficial life interests were that which is to be deemed to pass. In our judgment, however, the correct construction of the paragraph is that the "annuity or other interest purchased or provided" is that which is deemed to pass, though only to the limited extent indicated, and, where the "interest provided" is provided in the shape of policy moneys, arising from a policy formerly belonging to, and settled by, the settlor, it is not possible, in our view, to predicate that that interest, or any part of it, is property "in which the deceased never had an interest."

The order of FARWELL, J., must, therefore, be discharged, save in so far as it declares that estate duty is payable upon the death of Sir Frederick Macmillan in respect of the moneys received by the plaintiff upon the death of Sir Frederick under the policies included in the settlement of 1926 under sect. 2 (1) (d) of the Act of 1894 upon the principal value of the life interests therein which arose upon his death. It must be declared that estate duty is payable upon the death under sect. 1 of the Act in respect of the residue of the property comprised in the settlement of 1926 and in respect of the property comprised in the settlement of 1930, and that there is to be aggregation with other property passing upon the death of (a) the principal value of the life interests,

and (b) the residue of the property comprised in the settlement of 1926, and (c) the property comprised in the settlement of 1930. The Attorney-General's costs of the summons and of this appeal must be paid by the plaintiffs. Leave to appeal to the House of Lords will be given.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Broad & Son* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

GRIFFITHS AND OTHERS *v.* MANAGERS OF ST. CLEMENT'S SCHOOL, LIVERPOOL, AND TRUSTEES OF LIVERPOOL CHURCH OF ENGLAND SCHOOLS SOCIETY.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), **March 6, 7, 8, 1939.**]

Education—Non-provided school—Repair—Liability—Managers—Public authority—Public Authorities Protection Act, 1893 (c. 61), s. 1—Education Act, 1921 (c. 51), ss. 29-35.

The plaintiffs' son was, at the material time, a pupil of a non-provided school. The female plaintiff was invited to attend an exhibition of the pupil's work. The invitation was issued by the headmaster, and was issued with the authority of the managers of the school. The female plaintiff attended, and was injured through the collapse of a floor, due to want of repair. In an action for damages in respect of the injuries received, it was contended that the managers of the school were in occupation only as agents of the general committee of the Liverpool Church of England Schools Society, and also that, in holding the gathering in question, the managers were not acting in pursuance of any public duty, or in execution of any Act of Parliament, but were performing a purely voluntary act :—

HELD : (i) the school was provided by the managers, who were carrying out the functions of managers under the Education Act, 1921.

(ii) in holding the gathering at which the accident happened, the managers were performing part of their functions as managers of the school.

(iii) the managers were entitled to the protection of the Public Authorities Protection Act, 1893.

(iv) by the Education Act, 1902, the powers of management of the school were taken from the general committee of the Liverpool Church of England Schools Society, and placed in the hands of the managers, and, therefore, the general committee could not be responsible for what had happened.

Decision of TUCKER, J. ([1938] 3 All E.R. 537) affirmed.

[EDITORIAL NOTE.] In this case, the Court of Appeal, upon the point arising under the Public Authorities Protection Act, 1893, have felt themselves bound by their recent decision in *Greenwood v. Atherton* (1). TUCKER, J., found that the committee of the Liverpool Church of England Schools Society were not in occupation of the school, but the Court of Appeal have reached the same result upon a rather different view of the facts. The Court of Appeal have asked the question whether or not the committee could have interfered in any way with the action of the managers in issuing the invitations to the exhibition. This question being answered in the negative, it is clear that the committee can be under no liability to the plaintiffs.

AS TO REPAIR OF SCHOOL BUILDINGS, see HALSBURY, *Hailsham Edn.*, Vol. 12, p. 46, para. 92 : and FOR CASES, see DIGEST, Vol. 19, pp. 558-560, Nos. 28-32.]

Cases referred to :

- (1) *Greenwood v. Atherton*, [1938] 2 All E.R. 475 ; Digest Supp. ; *affd.*, [1938] 4 All E.R. 686 ; 108 L.J.K.B. 165 ; 160 L.T. 37.
- (2) *Bradford Corp'n. v. Myers*, [1916] 1 A.C. 242 ; 38 Digest 110, 784 ; 85 L.J.K.B. 146 ; 114 L.T. 83 ; *affg.*, [1915] 1 K.B. 417.
- (3) *Blencowe v. Northamptonshire County Council*, [1907] 1 Ch. 504 ; 19 Digest 560, 35 ; 76 L.J.Ch. 276 ; 96 L.T. 385.
- (4) *Abbott v. Isham* (1920), 90 L.J.K.B. 309 ; 19 Digest 563, 52 ; 124 L.T. 734.
- (5) *Hawkes v. Torquay Corp'n.*, [1938] 4 All E.R. 16 ; Digest Supp.
- (6) *Wilchick v. Marks & Silverstone*, [1934] 2 K.B. 56 ; Digest Supp. ; 103 L.J.K.B. 372 ; 151 L.T. 60.
- (7) *Crocker v. Plymouth Corp'n.*, [1906] 1 K.B. 494 ; 19 Digest 602, 289 ; 75 L.J.K.B. 375 ; 94 L.T. 734.
- (8) *Gillow v. Durham County Council*, [1913] A.C. 54 ; 19 Digest 560 32 ; 82 L.J.K.B. 206 ; 107 L.T. 689.

APPEAL from a decision of TUCKER, J., at the Liverpool Assizes, dated July 1, 1938, and reported [1938] 3 All E.R. 537. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

Rt. Hon. Sir William Jowitt, K.C., Wilfrid Clothier, K.C., and M. Turner-Samuels for the appellants, the plaintiffs.

Basil Nield for the first respondents, the school managers.

A. T. Miller, K.C., and Selwyn Lloyd for the second defendants, the Liverpool Church of England Schools Society.

Jowitt, K.C. : There is sufficient to justify a finding that the Liverpool Church of England Schools Society was in occupation, and that the society had a right of control, and that the managers were acting for them. It would be a possible view of the Acts that the managers were not placed under any statutory duty with regard to the upkeep of the fabric, but that, if they wanted to get the government grant, they would have to keep the building in proper repair in order to qualify for it. The managers could not be compelled by *mandamus* to maintain the building, but the making of a grant under sect. 7 of the Act is subject to the buildings being kept in a state of repair. In *Blencowe v. Northamptonshire County Council* (3), WARRINGTON, J., said that the Act of 1902 seemed to assume the provision of the school. It says nothing about the ownership, and the true conclusion to be drawn is that the managers have merely statutory rights over the schoolhouse which the owner allows to be used for the purposes of the school. Possession in the strict legal sense was not necessary in order to enable the managers to perform their duties. In the present case, the judgment of TUCKER, J., seems to overlook the fact that the essential point of this case is not whether or not there is a duty to repair. Mrs. Griffiths was invited to the premises, which, to the knowledge of those concerned, were in an unsafe condition. The position of those concerned is the same as that of a man who invites another to his house. If the man knows that the house contains a hidden trap or danger, and if the invitee is injured in consequence of it, the invitor is responsible. In *Greenwood v. Atherton* (1), it was held that the managers of a school were acting as a public body, and the action

against them was barred under the Public Authorities Protection Act, 1893. The duty in that case was different from the duty to repair a building. The present case rests upon the common law duty. The true view is that the trustees of the Liverpool Church of England Schools Society were at all material times the owners of the school, and that the general committee of that society were at all material times in control or occupation of that school. The Liverpool Church of England Schools Society were in occupation by the express terms of the trust deed under which they held. The duty to repair the schoolhouse is a duty under the trust deed. The Education Act, 1902, interfered with the society in certain respects, but the residuum of its powers was left to it. Except in certain specific matters, the discretion is not interfered with, and, therefore, the society is not a public authority at all. [Counsel referred to *Abbott v. Isham* (4) and *Bradford Corpn. v. Myers* (2).]

Clothier, K.C. : In providing the school, the Liverpool Church of England Schools Society were not doing anything the omission to do which could be regarded as a matter for complaint by any member of the public. In *Bradford Corpn. v. Myers* (2), the act complained of was not done in the direct execution of a statute, and it was held that the Public Authorities Protection Act, 1893, afforded the corporation no protection. The owners of the school in the present case were not acting in pursuance of any Act of Parliament, and were not performing a public duty. The Education Act, 1921, s. 29, imposes a condition, rather than a statutory duty. It is imposed as a condition of receiving the rate aid. If the obligation imposed by sect. 29 is a statutory obligation, it is not a public duty. The children who are obliged by law to attend the school would doubtless be entitled to the benefit of the obligation to repair contained in that section. Mrs. Griffiths is not entitled to the benefit of sect. 29. The only duty owed to her is the duty of the managers to guard her from unusual danger of which they knew, or ought to have known, and which she could not have avoided by any reasonable care on her own part. The managers may have been within their powers in issuing invitations, but they were under no duty to issue them. In *Hawkes v. Torquay Corpn.* (5), it was pointed out that what the corporation had done was permissive, and not obligatory, and BRANSON, J., pointed out, at p. 19, that it was impossible to extend the language of the Public Authorities Protection Act, 1893, as interpreted by *Bradford Corpn. v. Myers* (2), to cover such a voluntary course of conduct as there was in that case. In the present case, if the managers are entitled to the protection of the Act, it does not follow that the school society are entitled to its protection. The case falls within the principle of *Wilchick v. Marks & Silverstone* (6), in which GODDARD, J., said, at p. 67, that the plaintiff would have had no claim against the landlord if she had been a visitor to the premises. The trustees cannot be heard, on the trust deed, to say that they have parted with the possession and control of the building to an independent body. Therefore, there should be a finding that the

managers were the representatives of the society. [Counsel referred to *Greenwood v. Atherton* (1), reserving the right to argue in a higher court that this case was wrongly decided, and *Crocker v. Plymouth Corpn.* (7).]

Miller, K.C. : There is no ground for saying that the Liverpool Church of England Schools Society are responsible. In the alternative, if the
A Liverpool Church of England Schools Society have any responsibility, they are protected by the Public Authorities Protection Act, 1893. There was negligence in not keeping the premises in a state of repair. It is a fallacy on the part of the appellants to contend that this school was run and managed for the Liverpool Church of England Schools Society, and
B that the managers were the managers for the society. In 1902 the legislature took the matter out of the hands of private individuals, and a body of persons called school managers was constituted. The managers were appointed according to statutory provisions, and they were given statutory powers. They were to exercise the powers given by the trust
C deed, so far as any such powers continued to exist. The schools were built out of moneys provided by public subscription. A body of public-minded persons formed themselves into this society. The society called into existence the general committee, to which it left the duty of managing the school. The committee were neither the legal nor the equitable
D owners of the school. They were compelled to leave the control of the school to subcommittees, and their control was ultimately taken away by the Education Act, 1902, which created a wholly different body, to be appointed in part under the statute and in part by the local education authority. The case against the committee fails, and there
E is no suggestion of a case against the trustees. The matter rests upon an invitation sent out by the headmaster, who was appointed by the managers, to a function which was held in the elementary school carried on by the managers without any connection with the general committee. As regards breach of statutory duty—the other way in which the case
F has been put—that is a matter in which the general committee are not concerned. The general committee never were under any obligation to anybody to repair the school. The general committee never undertook any obligation to anybody. The obligation to repair is new. It is created by the Education Act, and it is put upon the managers. [Counsel
G referred to *Gillow v. Durham County Council* (8).]

Nield : I do not controvert the finding of negligence. I rely upon the Public Authorities Protection Act, 1893.

Jowitt, K.C., in reply : It is wrong to say that there is any obligation upon the managers, or upon the general committee, to carry on the school
H at all. The most that can be said is that, by providing a building, they can, in certain circumstances, get a parliamentary grant. It is not quite an accurate statement to say that the school cannot be closed. Eighteen months' notice of intention to close must be given. The consequences of closing without giving notice are that the local authority may enter and use the school : the Education Act, 1921, s. 40 (2). There

is no obligation upon anyone to carry on the school. Wherever a body is doing something under a statute, and it is not compelled to do it by the statute, it cannot avail itself of the Public Authorities Protection Act, 1893. Where there is no right on the part of anyone to insist upon the thing being done, the Public Authorities Protection Act affords no protection. [Counsel referred to *Greenwood v. Atherton* (1) and *Bradford Corpn. v. Myers* (2).] A

SIR WILFRID GREENE, M.R. : The respondents to this appeal are three bodies of persons, (i) the managers of St. Clement's School, Liverpool, (ii) two members of the committee, which is concerned with that school in a way which will appear later, and (iii) the trustees in whom the school itself is vested. The appellants are two of a number of plaintiffs. They are husband and wife, but the wife is the more important one, and she is referred to throughout as the appellant. On the evening of Dec. 12, 1934, she suffered serious injury at that school. Her case is taken in some way as a sort of test case, and the facts of her case are the only ones with which we are concerned. Her presence at the school on that evening was due to an invitation issued by the headmaster, with the authority and approval of the managers, to parents of children at the school, and to others. The occasion was one on which an exhibition of work done at the school—craft, drawing, handwork and things like that—was being held, and songs learned in the course of instruction at the school were given by some of the boys. Unfortunately, the floor on which this entertainment was taking place collapsed, and these injuries resulted. B C D E

The action was based on two grounds, (i) so far as the pleadings were concerned, an allegation of failure of duty towards the appellant as an invitee, and (ii) an alleged breach of duty of a particular provision in the Education Act, 1921, dealing with the repair of school buildings. The latter aspect of the matter has not been put forward before us as the true ground of liability. The case has been argued on the footing that the liability which the appellant is entitled to enforce is the common law liability due to breach of duty towards her as an invitee. That she was an invitee, and that there was a breach of duty, in that it was due to negligence that the floor was in an unsafe condition, are not disputed in this court. The judge found that breach of duty and that negligence, and on that basis the present appeal is conducted. The case against the managers turns upon one question, and upon one question only, and that is the application of the Public Authorities Protection Act, 1893, to their case. The case of the two members of the committee and the trustees stands on a rather different footing. It will be convenient at this stage to state the position of those parties quite shortly. F G H

I do not propose to go into the history of this school, because it does not appear to me to be necessary to do so. I need only refer to the original constituent document, the trust deed of Sept. 26, 1837, by which

an educational trust which governed the school was created. Pursuant to that, the property became vested in a body of trustees, but the trustees' functions may be described as passive. That is to say, they were to hold the property. The actual administration of the trust was to be directed by a committee of a newly-constituted body which was called the
 A Liverpool Church of England Schools Society. That body had a committee, and it was that committee to which the administration of that educational trust was entrusted by this document.

No claim is made—nor could any claim, I think, be made—against the trustees. They are joined as parties, but they are merely passive, and
 B they have nothing to do with the conduct of the school on any view. The position of the committee, on the other hand, will require a little investigation later.

I turn now to the position of the managers. It is important to notice at the outset one very crucial finding of fact of the judge. He says, at
 C p. 538 :

In my view, the managers had a material interest in inviting the plaintiff to the premises, in the sense that it was in the interests of the prosperity and success of the school to enlist the support and co-operation of the parents of the pupils in the work done at the school. The display in question consisted entirely of an exhibition of the work done by the pupils and of the singing of songs which they had learnt at the school. I accordingly hold that the plaintiff was an invitee, and not a mere licensee. I am further of opinion that on the occasion in question the school was being used as a public elementary school, and not for some extraneous purposes unconnected with its functions as a school.
 D

That latter finding—namely, that the school was being used as a public elementary school—was attacked in this court, and it was suggested that
 E there was no evidence on which the judge was entitled so to find. In my opinion, that was a finding which he was perfectly entitled to make, and it is a finding with which I agree.

Starting from that, we have, therefore, this position. The managers, in the course of carrying on the public elementary school and exercising
 F the powers of management conferred upon them by the Education Act, and not for some extraneous purpose, issue invitations to the appellant and others to come to a building which they are maintaining pursuant to their obligations under the Act and for the purposes of the Act. There are, therefore, two aspects of the matter. One is what function they were
 G performing in having the school there at all, in the sense of the actual building. The other is what they were doing when they issued the invitation. It is important to look at both those matters, in view of the language of the Public Authorities Protection Act, 1893, itself. I will read the relevant portions of sect. 1, which are as follow :

H Where . . . any action, prosecution, or other proceedings is commenced . . . against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority . . .
 (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within 6 months. . .

With regard to the actual provision of the school building, in my opinion, the point is covered by authority binding on this court—

namely, *Greenwood v. Atherton* (1). That was a case where the managers of a non-provided school were sued, together with the headmistress, who was also a defendant, by an infant scholar who was injured during recreation-time in the playground. The nature of the accident was this. There was a pair of large iron gates, and those gates swung together and crushed the infant's hand as he was playing in the playground. A It was alleged that the injury was caused by the negligence of the defendants in failing to take due care of the infant plaintiff while he was in attendance at the school. In that case, this court held that the managers were protected by the Public Authorities Protection Act, 1893. B *MACKINNON, L.J.*, said, at p. 688 :

This was a public elementary school not provided by the local authority, but, under that section [sect. 29], they were responsible for it, and had control of it . . . I think that it is manifest that, within the clearest meaning of those words [of the Public Authorities Protection Act], these defendants, the managers, as managing the school—managing a public elementary school governed by the Education Act, 1921—were providing this playground where the accident happened, C and doing the acts in pursuance, or execution, or intended execution, of the Act of Parliament—namely, the statute of 1921. That being so, it follows that any suit brought against them in respect of such an act must be commenced within the 6 months limited by the Act.

Taking that language, it seems to me that, in the present case, the managers were providing the building where the accident happened. D They were doing so because they were the managers of a public elementary school, and were carrying out the functions of such managers under the Education Act, 1921, and no doubt earning for the school the right to assistance from the public authority under sect. 29 of that Act. It seems to me, then, that the question whether or not the school was E being provided by the managers as a public authority entitled to the protection of the Act is concluded by authority which binds us.

The other aspect of the matter is what the managers were doing when they gave their sanction to the headmaster to issue the invitation to the appellant. The importance of that aspect of the case lies in this. F The main argument put forward on behalf of the appellant was to the effect that, whatever might be the application of the Public Authorities Protection Act to other acts of these managers, the particular act of issuing this invitation was not done in pursuance of any duty, or in execution, G or intended execution, of any Act of Parliament, but was a purely voluntary act on the part of the managers, which they were at liberty to do or not to do, as they pleased. Then it is said that the Public Authorities Protection Act applies only to acts with regard to the doing of which a H duty is imposed, and that, therefore, it does not apply to the issuing of these invitations, which was the essential step in the injury which happened to the plaintiff. In my opinion, that argument is not a sound one. It seems to me that the finding of the judge to which I have referred establishes the proposition that, in issuing the invitation, they were doing an act which formed part of the operation of carrying on a public elementary school. Schools can be carried on in one way or another. There is a

multitude of details which can be done in this way or in that way, or perhaps omitted altogether, without the school ceasing to be a public elementary school. A gathering such as this—and it is a very familiar type of gathering in schools of all sorts—is one which is obviously, I should have thought—and this view is supported by the finding of the judge—

A one in the doing of which the managers were performing part of their functions as managers in the conduct of this public elementary school.

It is not right, in my opinion, to say, as was said by counsel for the appellant, that one must be able to put one's finger upon some specific duty in the Act before the Act can apply. Acts of Parliament which

B impose public duties do not, as a rule, concern themselves with details. There are many different ways of carrying out a public duty, and, with regard to any step, it is almost always possible to say that it is optional. The point of the matter is what they were doing when they issued this invitation. Were they carrying on a public elementary school? The

C answer is that they were. Were they carrying on a public elementary school in execution of the Act? The answer is that they were.

The case on which great reliance was placed in support of this argument was the well-known case of *Bradford Corpn. v. Myers* (2), but that was a case of quite a different character. There the municipal corporation in

D question had power to carry on a gas undertaking, and they were bound to supply gas to the inhabitants of the district. In addition to that, they had a statutory power, which they could exercise or not, of selling the coke produced in the manufacture of the gas. They did sell that coke, and, while one of the contracts of sale was being carried out, their servant

E negligently let the coke shoot through the plaintiff's window. The Public Authorities Protection Act was relied upon, but it was held that it did not apply, because it was a case where the acts of supplying the coke and making the contract to sell the coke were purely voluntary, which they could exercise or not, as they pleased. That seems to me to be a

F totally different case. That was a case where what they were doing in supplying the coke was not something incidental to, or part of, the process of carrying on the gas undertaking and supplying gas compulsorily to the inhabitants. It was something that lay outside that altogether.

If, in the case of the present Act of Parliament, there had been some express provision giving a power to managers of public elementary schools to have gatherings of this kind, I could have understood the argument that the legislature, by putting that in in terms expressly as a power, intended to negative the suggestion that, if it was exercised, it was something done in execution of a statutory duty. That is not the

H case here. The power here, and the function here, is the carrying on of the school as a public elementary school. The act of issuing the invitation was a reasonable and proper incident in the doing of that thing—the carrying on of the school—and the fact that the managers need not have issued it if they did not want to do so appears to me to be a quite irrelevant consideration. For those reasons, I am of opinion that the

judge was right in holding that the Public Authorities Protection Act, 1893, protects the managers.

I now come to say a word about the position of the committee. If it had not been for the passing of the Education Acts, I think that it may very well have been the case—indeed, it probably would have been the case—that any managing committee duly appointed under the trust deed, and acting (as it would have been acting) under the entire guidance of the committee set up by the deed, would have been acting as agents for that committee. However, be that as it may, the position is entirely changed by the Education Acts. Many of the powers which they could have exercised—indeed, most of the powers with regard to management which they could have exercised—are taken away from them, and are vested in a new body, set up by the Act, with statutory powers which completely disregard and override any powers which, under the original constitution of the trust, the original body of management may have had. I do not think it necessary to refer to the various sections of the Act. They are set out in the careful judgment of the judge. Summarising the result of them, I think that it comes to this. The powers of management in respect of a non-provided public elementary school which comes under the Act are divided between the local education authority and the managers, and any pre-existing managing body under the trust is to that extent displaced.

One may test the matter with regard to the present case by putting the question whether or not this committee could have interfered with the discretion of the managers in the matter of issuing invitations to this gathering. It seems to me that, having regard to the provisions of the Act, that question can only be answered in the negative, and that, if the committee had endeavoured to interfere, and to prohibit this gathering, or had endeavoured to issue instructions to the managers with regard to it, and to forbid them to issue invitations to it, the managers would have been entitled to point to the Act of Parliament and say: "The issuing of those invitations is a matter within our statutory powers of management, and you have no right to interfere with it, one way or the other. You have no power to order us to do such a thing, and you have no power to forbid us to do it." It seems to me impossible to say that the issuing of these invitations was something in the doing of which the managers were binding the committee as though they were their principals. In the old days, the result, as I say, might very well have been different, but the relationship between this committee and the managers since the Education Acts seems to me to make it impossible to say that the act of the managers in issuing the invitation was the act of the committee.

The same observation applies to the other branch of the matter—that is to say, the maintenance of the school buildings. In maintaining, or in not maintaining, the school buildings the managers were doing something which was within the scope of the matters with which they were entrusted by the Act of Parliament. It seems to me that the committee

are out of the picture altogether, for the present purpose. Whatever ultimate residual powers they may have—and it is not necessary to decide whether there may be some powers which they still may exercise—certainly, so far as management is concerned, the power of management is outside their capacity. That really disposes of the case against the
 A committee. It is not, I think, in any way inconsistent with the view which the judge took of that matter. He said that the committee was not in occupation, but that the managers were in occupation under their statutory authority. That, I think, is merely a different way of arriving at the same result, and, possibly, merely a different method of expressing
 B the same conclusion. In the result, it is not necessary to investigate the question whether, if the committee had been liable, the Public Authorities Protection Act would have protected them. That is a matter which I do not think it necessary to discuss. For these reasons, the appeal, in my opinion, should be dismissed.

C
 MACKINNON, L.J. : I agree. The matter was very fully dealt with by TUCKER, J., in his very careful judgment, which is now under appeal. It has now again been fully dealt with by SIR WILFRID GREENE, M.R., and I do not think that I should do any service to anybody if I added anything.

D
 FINLAY, L.J. : I also agree, and do not desire to add anything.
Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors : *Silverman, Jordan & Co.*, agents for *Silverman & Livermore*, Liverpool (for the appellants); *Gamon, Arden & Co.*, Liverpool
 E (for the first respondents); *Pritchard, Sons, Partington & Holland*, agents for *Buckley, Pidgeon, Watson & Blackwood*, Liverpool (for the second respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

F
 EMPIRE MEAT CO., LTD. v. PATRICK.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), **March 2, 3, 14, 1939.**]

G
Master and Servant—Contract of service—Restrictive covenant—Scope of restrictions on service—Radius agreement—Radius of 5 miles—Trade proved not to exceed 1 mile—Validity—Manager of butcher's shop.

H
 The respondents were the owners of a butcher's business carried on at a shop in Cambridge. They had other shops but that fact was not material to the present case. There were some 200 cash customers and 131 credit customers of the shop, and the appellant was the manager, working in the shop and interviewing the customers. It was not clearly proved from what district all the cash customers came, but it was found that the vast majority of the trade was done within a mile of the shop. In 1928 the appellant entered into a covenant with the respondents that, upon the determination of the service agreement then entered into, he would not enter into or carry on or in any way assist or be concerned in the carrying on either directly or indirectly of the business of a butcher or meat seller, either on his own behalf or on behalf of any other person or persons, corporation or company, nor would he enter into the employ

of any person or persons, corporation or company carrying on or concerned in carrying on such business or any similar business within a distance of 5 miles from the shop in question. In Oct., 1938, the appellant left the employ of the respondents and shortly afterwards opened a butcher's shop a few doors away from that of the respondents :—

HELD : (i) the area of the trade was so circumscribed that the radius of 5 miles was unnecessarily wide, and the covenant was unenforceable. A

(ii) In respect of the restrictions imposed on service, the agreement was somewhat widely drawn, but was not necessarily bad on that ground.

(iii) this was a case in which an area agreement was necessary.

Decision of OLIVER, J., ([1939] 1 All E.R. 606), reversed on the facts.

[EDITORIAL NOTE.] The Court of Appeal have decided this case upon a view of the facts slightly different from that taken by OLIVER, J. The view taken by OLIVER, J., was that there was no greater restriction in fixing a radius of 5 miles than there would have been in fixing one of 2 miles. The Court of Appeal, however, have taken the view that, if a radius of 2 miles is sufficient for the protection of the business, then a covenant extending the restriction to 5 miles is void. In considering the protection necessary for the business, regard must be had to the proved facts as to the area from which the customers come. The judgment herein considers again the authorities upon this question, and, so far as the case of a retail shop is concerned, is of the greatest importance. However, as was pointed out upon refusing an application for leave to appeal to the House of Lords, the question is one of the application of principles to the particular facts of a particular business, and the only question involved is one of the approach of the courts in a consideration of what is adequate protection in regard to distance. It will be noted that the judgment makes no direct reference to the point raised in argument that regard must be had to the future development of the employer's business. B C D

AS TO RADIUS AGREEMENTS, see HALSBURY, 1st Edn., Vol. 27, Trade, pp. 569-580, paras. 1105-1115; and FOR CASES, see DIGEST, Vol. 43, pp. 19-30, Nos. 120-234.] E

Cases referred to :

- (1) *Mason v. Provident Clothing & Supply Co., Ltd.*, [1913] A.C. 724; 43 Digest 22, 143; 82 L.J.K.B. 1153; 109 L.T. 449; *revsq.*, [1913] 1 K.B. 65.
- (2) *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; 43 Digest 11, 59.
- (3) *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535; 43 Digest 22, 139; 63 L.J. Ch. 908; 71 L.T. 489; *affg.*, [1893] 1 Ch. 630.
- (4) *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688; 43 Digest 24, 154; 85 L.J. Ch. 210; 114 L.T. 618; *affg.*, [1915] 2 Ch. 57.
- (5) *Attwood v. Lamont*, [1920] 3 K.B. 571; 43 Digest 20, 131; 90 L.J.K.B. 121; 124 L.T. 108.
- (6) *Edwards & James, Ltd. v. Lakin Senior* (1926), July 21, Unreported.
- (7) *Putman v. Taylor*, [1927] 1 K.B. 741; 43 Digest 47, 480; 96 L.J.K.B. 726; 137 L.T. 291; *on appeal from* [1927] 1 K.B. 641.
- (8) *Edwards & James, Ltd. v. Lakin Junior* (1926), July 21, Unreported.
- (9) *Gilford Motor Co. v. Horne*, [1933] Ch. 935; Digest Supp.; 102 L.J.Ch. 212; 149 L.T. 241.
- (10) *Willett, Ltd. v. Beasley* (1923), 58 L.Jo. 355.
- (11) *East Essex Farmers, Ltd. v. Holder* (1926), 70 Sol. Jo. 1001; 43 Digest 43, 435.
- (12) *Fitch v. Dewes*, [1921] 2 A.C. 158; 43 Digest 34, 276; 90 L.J.Ch. 436; 125 L.T. 744; *affg.*, [1920] 2 Ch. 159.
- (13) *Scottish Farmers' Dairy Co. (Glasgow), Ltd. v. M'Ghee*, [1933] S.C. 148.
- (14) *Vancouver Malt & Sake Brewing Co., Ltd. v. Vancouver Breweries, Ltd.*, [1934] A.C. 181; Digest Supp.; 103 L.J.P.C. 58; 150 L.T. 503.

- (15) *Davis v. Mason* (1793), 5 Term Rep. 118; 43 Digest 64, 661.
 (16) *Hitchcock v. Coker* (1837), 6 Ad. & El. 438; 43 Digest 36, 326; 6 L.J. Ex. 266.
 (17) *Proctor v. Sargent* (1840), 2 Man. & G. 20; 43 Digest 25, 172; 10 L.J.C.P. 34.
 (18) *Mallan v. May* (1843), 11 M. & W. 653; 43 Digest 32, 258; 12 L.J.Ex. 376;
 1 L.T.O.S. 110, 258.
 A (19) *Haynes v. Doman*, [1899] 2 Ch. 13; 43 Digest 24, 158; 68 L.J.Ch. 419;
 80 L.T. 569.
 (20) *Eastes v. Russ*, [1914] 1 Ch. 468; 43 Digest 43, 432; 83 L.J.Ch. 329; 110
 L.T. 296.
 (21) *Spink (Bournemouth), Ltd. v. Spink*, [1936] Ch. 544; [1936] 1 All E.R. 597;
 Digest Supp.; 105 L.J.Ch. 165; 155 L.T. 18.
 B (22) *Turner v. Evans* (1852), 2 De G.M. & G. 740; 43 Digest 77, 814.
 (23) *Vincent of Reading v. Fogden* (1932), 48 T.L.R. 613; Digest Supp.
 (24) *British Reinforced Concrete Engineering Co., Ltd. v. Schelff*, [1921] 2 Ch. 563;
 43 Digest 35, 310; 91 L.J.Ch. 114; 126 L.T. 230.

APPEAL by the defendant from a judgment of OLIVER, J., dated Feb. 16, 1939, and reported [1939] 1 All E.R. 606. The facts are fully
 C set out in the judgment of the court delivered by FINLAY, L.J.

R. C. Vaughan and John Hobson for the appellant.

A. T. Deining, K.C., and Robert Ives for the respondents.

Vaughan: The respondent company failed to discharge the onus
 D which rested upon it of showing that a radius agreement was reasonably
 necessary for the protection of its trade and goodwill. The scope of the
 agreement was unnecessarily wide. On the evidence, the nature of
 the trade at this branch was so circumscribed that a radius agreement
 of 5 miles was so wide as to be unreasonable. Practically all the cus-
 E tomers came from within a radius of 2 miles. The trend of the cases is
 that a radius agreement involving total exclusion is the last resort to
 which an employer is entitled to have recourse. In order to justify that,
 he must satisfy the court that there is no other way in which his legiti-
 mate interests can be protected. Since 1915, there has been a uniform
 F line of authorities to show that a solicitation agreement is bad from the
 beginning, unless the clause makes it plain that it refers only to the
 customers of the former employer. It is only in cases where an
 employer's business secrets or his trade connection cannot be protected
 by a solicitation agreement that the employer is entitled to enforce a
 radius agreement. Even if a radius agreement was necessary in the
 G present case, the extent was wider than necessary. With regard to
 whether or not the ambit or scope of a restriction is reasonable, it is
 necessary for the respondent company to show that the duties of the
 employee were so specialised or so confidential that the wide restrictions
 in the covenant are necessary. In *Edwards & James, Ltd. v. Lakin*
 H *Senior* (6), there was a milk-seller's agreement in which the restraint
 was for 2 miles and 2 years. The business was done within a radius of
 one mile. ROCHE, J., held that the covenant was too wide. In *Edwards*
& James, Ltd. v. Lakin Junior (8), the restraint was from soliciting and
 serving former customers only. The judgments in those cases are helpful,
 because they show the contrast between the two agreements. In *Gilford*

Motor Co. v. Horne (9), not only was the covenant against soliciting and serving former customers, but there was also a radius agreement. No attempt was made, however, to enforce the covenant as respects the radius. In the present case, the respondent company has failed to establish that it cannot be adequately protected by a covenant in the form adopted in *Gilford Motor Co. v. Horne* (9). If a non-dealing covenant was sufficient to protect the respondent company's reasonable interests, the covenant as drawn is too wide, and is, therefore, unenforceable. [Counsel referred to *Mason v. Provident Clothing & Supply Co., Ltd.* (1), *Herbert Morris, Ltd. v. Saxelby* (4), *Attwood v. Lamont* (5), *Willett, Ltd. v. Beasley* (10), *East Essex Farmers, Ltd. v. Holder* (11), *Fitch v. Dewes* (12) and *Scottish Farmers' Dairy Co. (Glasgow), Ltd. v. M'Ghee* (13).] A

Denning, K.C. : The cases show a contest between freedom of trade and observance of contract. The court should not allow the law to go any further in absolving people from their contractual obligations. In *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* (3), LORD WATSON said that it is in the interest of the community that the rules of fair dealing shall be observed, and that an infraction of these rules may do more harm than any contract in restraint of trade may do. In the present case, the appellant was in full charge of the respondent company's shop. He was in personal contact with the customers, and he dealt with all the books. When the appellant entered into this contract, he had already been the manager of the shop for 9 years, and he was quite capable of judging for himself as to what was right and what was not. He entered into the agreement voluntarily. The area was not too great, because means of communication are now much improved, and trade tends to become centralised in a town. There is a tendency for people in the villages to shop in the town. The possible future development should be taken into consideration. The appellant was in close touch with the customers at the respondent company's shop and a large number automatically went to him. In *Vancouver Malt & Sake Brewing Co., Ltd. v. Vancouver Breweries, Ltd.* (14), it was laid down that, in order that a restraint could be enforced, it had to be reasonable as between the parties, and not injurious to the public well-being. In *Herbert Morris, Ltd. v. Saxelby* (4), it was said that it was for the persons supporting a restraint to show that special circumstances justified it. An employer is entitled to protection for his trade connection, notwithstanding that that may involve some protection against competition. The appellant's knowledge of the customers, and of their likes and dislikes, was not his, but his employers'. An employer does not get adequate protection unless there is a reasonable margin of safety. *Putsman v. Taylor* (7) was a case of a radius agreement where the employee was not to be employed within the area in any capacity, and the court held that the restraint was not unreasonable. In *Scottish Farmers' Dairy Co. (Glasgow), Ltd. v. M'Ghee* (13), there was a restriction against being employed in any capacity within one mile of the former employer's place D E F G H

of business, and the restriction was held to be good. It was held that the restriction was not wider than was necessary for the protection of the employer's interest, although it involved a restriction upon competition. OLIVER, J., held, in the present case, that the agreement was reasonable, and there is no ground for saying that he was wrong.

A [Counsel referred to *Mitchel v. Reynolds* (2), *Davis v. Mason* (15), *Hitchcock v. Coker* (16), *Proctor v. Sargent* (17), *Mallan v. May* (18), *Haynes v. Doman* (19), *Mason v. Provident Clothing & Supply Co., Ltd.* (1), *Eastes v. Russ* (20), *Fitch v. Dewes* (12), *Attwood v. Lamont* (5), *Putzman v. Taylor* (7), *Spink (Bournemouth), Ltd. v. Spink* (21), *Turner v. Evans* (22) and *Edwards & James, Ltd. v. Lakin Senior* (6).]

B *Hobson*, in reply : The only point to consider is whether or not the covenant is one wider than that to which the employer is entitled for the protection of his business. If the covenant is bad, it is wholly bad, and no part of it will be enforced. That which an employer is entitled
C to protect and that against which he is entitled to protection was laid down in *Herbert Morris, Ltd. v. Saxelby* (4) by LORD ATKINSON, at p. 761. In the present case, the only thing the respondents are entitled to protect is the goodwill of the 300 customers at their shop at 62, Mill Road, Cambridge. The only thing against which they are entitled to protection
D is the knowledge of the appellant of those customers who were customers at the time he was employed at the shop. In the present case, the covenant is bad because the area stated is too large, and also because the appellant is excluded from too many kinds of employment. Also the respondents could have obtained all the protection to which they
E are reasonably entitled by means of a solicitation and service agreement, and a radius agreement in this case was unnecessary. The area in respect of which the respondents were entitled to protection was not more than a radius of 2 miles. In *Edwards & James, Ltd. v. Lakin Senior* (6), a radius of 2 miles was held excessive. ROCHE, J., pointed out that the
F evidence showed that the work of the depot did not extend more than one mile. In *Vincent's of Reading v. Fogden* (23), it was held that a covenant was too wide, for the reason that it excluded the employee from too many businesses, and thus gave the employer a wider protection than was necessary. If severance is possible, our contention is that
G the main part of the agreement is bad. A radius agreement can only be justified where it is the only means by which an employer can obtain protection from the unlawful use by an employee of secrets which the employee obtained during his former service. In the present case, the covenant is wider than is necessary to protect the reasonable interests
H of the respondent company, and the area is too great. [Counsel referred to *Fitch v. Dewes* (12), *Mason v. Provident Clothing & Supply Co., Ltd.* (1), *British Reinforced Concrete Engineering Co., Ltd. v. Schelff* (24), *Willett, Ltd. v. Beasley* (10) and *Attwood v. Lamont* (5).]

FINLAY, L.J. [delivering the judgment of the court] : This is an appeal from a judgment of OLIVER, J., in an action brought by the plaintiffs,

who own butcher's shops, against the defendant, who was for many years in their service. Among their other butcher's shops, the plaintiffs own and operate two in Cambridge—one in Petty Cury, a busy street in the middle of the town, and the other, to which this action relates, in Mill Road, less centrally situated. It appears, though this is of little importance, that about 10 other butcher's shops in Cambridge are owned by A a company with which the plaintiffs are closely allied. From 1919 till Oct., 1938, the defendant was the manager of the Mill Road shop. He himself worked in the shop, interviewing customers, cutting up meat, and also dealing with the accounts. He had the assistance in the shop of a man called Read, and there were two roundsboys. A substantial business B was done both in the sale of English and imported meat. There were both credit customers and cash customers. The credit customers numbered 131, and a list of them was handed in by a witness named W. G. Tubby, district manager of the plaintiffs. The list purported to show how far from the Mill Road shop the various customers lived. C Unfortunately, the list proved to be grossly inaccurate and misleading as regards distances, and this fact was referred to with much severity by OLIVER, J., both in the course of the evidence and also in his judgment. As to the cash customers, who numbered about 200, it is clear D that it is not really known whence they came. It was admitted by Mr. Tubby, however, after a good deal of shuffling that the vast majority of the trade of the shop was done within a mile or a half-mile of the shop. This is what one would expect, we think, with a shop of this character in a street such as Mill Road.

The business under the defendant's management was successful. There E were inevitable fluctuations, but it was found by OLIVER, J., that it was a business making a profit of £6 per week. After the defendant had been for some years in the plaintiff's service—that is, about the end of 1927 or the beginning of 1928—he took a house in Mill Road a few doors from the shop, and his wife there established, and for some years carried on, a F millinery business. In June, 1938, the wife became ill, and was compelled to give up the millinery business. In Sept., 1938, her stock was sold, and in October the defendant, having given one week's notice, left the plaintiffs' service. On Oct. 22, he opened a rival butcher's shop in the premises where his wife had carried on her millinery business. G

It appears that Read, the assistant, and one of the roundsboys, having, of course, given the proper notice to the plaintiffs, went with the defendant to his new shop. On Jan. 3, 1928, soon after the defendant had taken the house where his wife carried on her business, an agreement was entered into between the plaintiffs and the defendant, and it is on a clause H in this agreement that the whole case turns. It was an agreement whereby the plaintiffs agreed to employ the defendant at a salary of £4 15s. per week, and in consideration thereof the defendant undertook and agreed :

(2) That in the event of the termination of this agreement from any cause he will neither enter into or carry on or in any way assist or be concerned in the carrying on either directly or indirectly of the business of a butcher or meat-seller,

either on his own behalf or on behalf of any other person or persons, corporation or company, nor will he enter into the employ of any person or persons, corporation or company carrying on or concerned in carrying on such business or any similar business within a distance of 5 miles from the place of business of the said company situate at 62, Mill Road, Cambridge, for 5 years.

A The population of the borough of Cambridge, including several villages recently brought within its boundaries, was agreed to be 81,760. It was further agreed that, outside the borough, but within the radius of 5 miles, there was a population of 16,040, mainly located in such villages as Great Shelford, Coton, Histon, Milton, Fulbourn and Girton. The situation is clearly shown on a map, on which it is agreed that the 5-mile radius is accurately drawn.

B When he went to his new shop, the defendant took with him—and OLIVER, J., points out that this was not surprising—a very substantial part of the trade previously carried on by the plaintiffs. The result was, as the judge finds, that the business, which had been making £6 per week profit, now made a loss of about £3 per week. We do not doubt that the plaintiffs could have entered into a properly limited agreement with the defendant by which they would have been enabled to restrain him from doing what he has done, but, as was pointed out by VISCOUNT HALDANE, L.C., in *Mason v. Provident Clothing & Supply Co., Ltd.* (1), at p. 732:

D . . . the question is not whether they could have made a valid agreement, but whether the agreement actually made was valid.

E The case was extremely well argued before us, and our attention was called to a large selection of a long line of cases on this subject from *Mitchel v. Reynolds* (2) downwards. There appear to be now four modern leading cases on this subject, three of them being decisions of the House of Lords. The four cases are *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., Ltd.* (3), *Mason v. Provident Clothing & Supply Co., Ltd.* (1), *Herbert Morris, Ltd. v. Saxelby* (4) and *Attwood v. Lamont* (5). In the *Nordenfelt* case (3), LORD MACNAGHTEN laid down what he described as the true view in a passage, which has been constantly referred to since, at p. 565:

G The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.

H This position was reached only after very considerable fluctuation of opinion, as was to be expected, for it has been the task of the courts to reconcile as far as possible two principles—namely, that trade should be free, and that persons should be bound by their contracts. To both of these principles the law has attached the greatest importance, but it is impossible to apply both fully. This matter is referred to by LORD

SHAW OF DUNFERMLINE in *Mason v. Provident Clothing & Supply Co., Ltd.* (1), at p. 739, and by LORD ATKINSON in *Herbert Morris, Ltd. v. Saxelby* (4), at p. 699. This aspect of the matter is well summed up by a passage in the judgment of LORD STERNDALE, M.R., in *Attwood v. Lamont* (5), at p. 577 :

These questions are difficult, as they require the reconciliation of two principles : (1) that of freedom of contract, by which a person is held bound by an agreement into which he has deliberately entered ; and (2) that of freedom of work, by which an employer is prevented from restraining a servant from exercising his energies in work for himself or others to an extent greater than is necessary for the protection of the employer. They are also made more difficult by an alteration in the tendency of decisions on the subject, the earlier cases tending to the enforcement of the former principle, while the tendency of later decisions, especially those of *Mason v. Provident Clothing & Supply Co., Ltd.* (1) and *Herbert Morris, Ltd. v. Saxelby* (4), is towards a stricter application of the latter. The result necessarily follows that statements in some of the earlier cases require, in the light of the later decisions, considerable modification before acceptance.

It is clear that there is now a well established distinction between the case of an agreement with a servant and the case of an agreement between vendor and purchaser, but this distinction was made clear only in the opinion of LORD MACNAGHTEN in *Nordenfelt* case (3). This matter was thus expressed by LORD PARKER OF WADDINGTON in his opinion in *Herbert Morris, Ltd. v. Saxelby* (4), at p. 708 :

It was argued before your Lordships that no distinction can be drawn between the position of the purchaser of the goodwill of a business taking such a covenant from his vendor and the case of the owner of a business taking such a covenant from his servant or apprentice. In both cases it was said that the property to be protected was the same and the dangers to be guarded against the same. I am of opinion that this argument cannot be accepted. The distinction between the two cases is, I think, quite clear, and is recognised both by LORD MACNAGHTEN and LORD HERSCHELL in the *Nordenfelt* case (3).

Then LORD PARKER OF WADDINGTON there goes on to develop the matter by pointing out what is no doubt the essential line of distinction—namely, that the purchaser is entitled to protect himself against competition on the part of his vendor, while the master is not entitled to protect himself against competition on the part of his servant : see *per* YOUNGER, L.J. in *Attwood v. Lamont* (5), at p. 589 :

An employer is not entitled by a covenant taken from his employee to protect himself after the employment has ceased against his former servant's competition *per se*, although a purchaser of goodwill is entitled to protect himself against such competition on the part of his vendor.

It is clearly settled by the cases that it is for the plaintiffs to establish that the restriction that they have sought to impose goes no further than was reasonable for the protection of their business : see *per* VISCOUNT HALDANE, L.C., in *Mason v. Provident Clothing & Supply Co., Ltd.* (1), at p. 733, and *per* YOUNGER, L.J., in *Attwood v. Lamont* (5), at p. 587. The whole matter is, we think, clearly and authoritatively summed up in the opinion of LORD PARKER OF WADDINGTON in *Herbert Morris, Ltd. v. Saxelby* (4), at pp. 706, 707 :

As I read LORD MACNAGHTEN's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The

onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another. It will be observed that in LORD MACNAGHTEN'S opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed ; to be reasonable in the interests of the public it must be in no way injurious to the public.

This being the law, it only remains to apply it to the facts of the present case. Three points were debated before us. It was contended by counsel for the appellant (i) that the respondents had failed to establish here that what has been called an area agreement was necessary for their protection, (ii) that the clause in the agreement was unnecessarily wide, inasmuch as it forbade the appellant from entering into service, in whatever capacity and in whatever branch of business, of any person part of whose business was that of a butcher, and (iii) that the area of the trade was so circumscribed that, on any view, the radius of 5 miles was unnecessarily wide. We accept the view (admirably summarised by Mr. Hobson in his very able and concise reply) that the appellant is entitled to succeed on the third of these points, and we deal first with that point, upon which, in our view, this case turns.

On this question as to the area of 5 miles, OLIVER, J., in his judgment says this, at p. 611 :

I do not think that in the case of Cambridge there was really any greater restriction in saying 5 miles than there would be in saying 2 miles.

This is, we think, the only point in the judgment with which we definitely disagree, but unfortunately it is a crucial point. It is clear on the evidence, and it is found by the judge, that the great bulk of the plaintiffs' business was within a radius of 2 miles. If it were necessary, we should be prepared to go further, and to say that the great bulk of it was within a one mile radius, but it is sufficient to say that beyond a 2 miles radius the customers appear to be quite negligible in number. In these circumstances, it seems to us impossible to hold that the respondents have satisfied the onus which rests upon them of establishing that the 5 miles radius was necessary for the protection of their business. We cannot, with deference, understand how it can be said that there was no greater restriction in saying 5 miles than in saying 2 miles. Outside the 2 miles radius, but within the 5 miles radius, there were about 20 villages, and a population of 16,040. In our opinion, on the facts here, the 2 miles radius comprising practically the whole of Cambridge, is the very utmost that could be supported. The case of the very few customers who came from outside that area could have been specially dealt with in the agreement, but their existence was no justification for sweeping in all the inhabitants of the area lying between the 2 mile and the 5 mile limits. Upon this point, the authorities are of use only by way of illustration. Each case must be decided upon its own facts. We may, however,

refer to a decision of ROCHE, J., in *Edwards & James, Ltd. v. Lakin Senior* (6). That case had reference to a milk round, and ROCHE, J., after referring to the leading authorities, said this :

It is sufficient to say that on the evidence, particularly having regard to the evidence given by the plaintiffs themselves, that the area covered by the work of the depot at which Lakin senior was employed during the term of his employment with the plaintiff company did not exceed at any rate one mile, and having regard to that part of the clause in his agreement extending the protection to 2 miles . . . that factor is sufficient to invalidate that part of the clause and to show that it is wider than is reasonable or wider than is necessary for the protection of the employers, and contrary to the interests, at any rate, of the defendant, and, therefore, for those reasons, bad under the principles laid down in the cases to which I have referred.

We think that, *mutatis mutandis*, these words of ROCHE, J., apply to the present case, and are correct. Upon this ground, we think that this appeal must be allowed.

This makes it unnecessary to decide the other two points, but, out of respect for the full arguments we heard, we will briefly discuss them. The agreement is certainly somewhat widely drawn with reference to the restrictions imposed on service, but, though the matter is one of some doubt, we are not prepared to hold that it is bad on this ground. Nor are we prepared to hold that this was a case where the area agreement was unnecessary. A large part of the respondents' business consisted of sales to cash customers, whom it is very difficult to identify. On this point, we cannot differ from OLIVER, J., and we think that support for his view is to be obtained from *Putsman v. Taylor* (7).

As we have already said, we think that the appellant is right in his contention that the respondents have failed to establish that the 5 miles radius was necessary for their protection. The result, therefore, will be that the appeal must be allowed, and the action dismissed. The defendant must have the costs both here and in the court below.

Appeal allowed with costs in both courts.

Solicitors : *Waterhouse & Co.*, agents for *Few & Co.*, Cambridge (for the appellant) ; *Wilfrid Ellis* (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

UNION COLD STORAGE CO., LTD. v. SIMPSON.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), **March 1, 2, 3, 16, 1939.**]

Income Tax—Deductions against profits—Wear and tear—Full repairing covenant by lessee—Renewals paid for by lessor—"Actual cost"—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 6 (2), (6).

Certain premises, with the machinery and plant thereon, were let to the appellant company by a lease containing a full repairing covenant on the part of the company. The lessors, who were in fact two persons in a position to control the appellant company, were in the accounts of the company charged with all the renewals of plant of a capital nature, but the company bore the expense of renewals of a revenue

nature. In these circumstances, the company claimed that the machinery and plant must be deemed to belong to them for the purposes of Sched. D, Cases I and II, r. 6, and that they were entitled to allowances for wear and tear:—

HELD: the company were entitled to the allowances claimed.

Decision of MACNAGHTEN, J. ([1938] 4 All E.R. 673) reversed.

Heyhoe v. Slough Theatre Co., Ltd. (1), overruled.

A

[EDITORIAL NOTE.] This matter was first considered by FINLAY, J., in *Heyhoe v. Slough Theatre Co., Ltd. (1)*, but in that case he did not have the advantage of hearing any argument against the Crown's contention. In the court below, MACNAGHTEN, J., after a full argument, followed the decision in *Heyhoe v. Slough Theatre Co., Ltd. (1)*, but the Court of Appeal have unanimously reversed that decision. The point is purely one of construction of the rule in question, or rather, it seems, a choice between two constructions of that rule, neither of which is a completely satisfactory one.

B

AS TO REDUCTIONS IN RESPECT OF WEAR AND TEAR OF PLANT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 166-169, paras. 339-344; and FOR CASES, see DIGEST, Vol. 28, pp. 52-54, Nos. 266-276.]

C

Cases referred to:

- (1) *Heyhoe v. Slough Theatre Co., Ltd. (1933)*, 17 Tax Cas. 488; Digest Supp.
- (2) *Hall (John) Junior & Co. v. Rickman*, [1906] 1 K.B. 311; 28 Digest 53, 267; 75 L.J.K.B. 178; 94 L.T. 224.
- (3) *Birmingham Corpn. v. Barnes*, [1935] A.C. 292; Digest Supp.; 104 L.J.K.B. 281; 152 L.T. 558; 19 Tax Cas. 195.

D

APPEAL by the Union Cold Storage Co., Ltd., from a judgment of MACNAGHTEN, J., dated Oct. 14, 1938, and reported [1938] 4 All E.R. 673. The facts are fully set out in the judgment of SCOTT, L.J.

E

Sir Patrick Hastings, K.C., J. H. Stamp and D. Knight Dix for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the Crown.

F

SCOTT, L.J.: On the main issue between the parties, these two appeals raise the same question, the only difference between the two being that the case in which Mr. Simpson is the respondent relates to the tax years 1923-1924 to 1926-1927, whereas the appeal in which Mr. Ellerker is respondent relates to the tax years 1927-1928 to 1934-1935. The question is whether or not the appellant company is entitled to

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allowances in those years for depreciation by wear and tear and obsolescence of certain leased machinery and plant under Sched. D, Cases I and II, r. 6. The commissioners in both cases held that they were precluded by the decision of FINLAY, J., as he then was, in *Heyhoe v. Slough Theatre Co., Ltd. (1)* from admitting the company's claim. In

H

that case, the respondent company did not appear to support the decision of the commissioners in its favour, and the only argument heard was on the Crown side. FINLAY J., did his best to consider possible answers for the respondent company, but in the end gave a reasoned judgment in favour of the Revenue. In the present two cases, the Union Cold Storage Co., Ltd., have appealed, but MACNAGHTEN, J., followed the

decision of FINLAY, J., in *Heyhoe's* case (1) and dismissed both appeals. From his decision the company now appeal to this court. The correctness of the *Heyhoe* decision (1) is thus also in issue.

The allowance for depreciation was first introduced by the Finance Act, 1878, s. 12. It is reproduced in almost the same language in Sched. D, Cases I and II, r. 5 (1), (2), (5), in the code of 1918. It was in its nature a departure from the principle of the income tax, in that it was a concession concerned with capital. Commercially, however, it was not a departure, since over any long period of years the profits of a business must be affected by the cost of renewing capital items, and fixed plant and machinery may, in a commercial view, be regarded as standing half-way between land and buildings, at one end of the scale, and pure revenue items, like removable implements, at the other. As between the Inland Revenue and the trader, a practice of agreeing on an appropriate annual percentage to apply year by year to prime cost was early adopted. In 1906, in *Hall (John) Junior & Co. v. Rickman* (2), the Inland Revenue raised the contention that, where the percentage allowances made over a prolonged period of years nearly approached the capital cost of the unit, any further claim was by law limited to such figure as would not make the total concessions plus saleable value of the worn item exceed 100 per cent. of its capital cost. However, WALTON, J., held, on the construction of the section, that the taxpayer's right in the tax year in question was not affected by the allowances of past years. To repeal this decision, the legislature passed the Finance Act, 1907, s. 28, now represented by r. 6 (6). Rule 6 (1), (2), (5) deals with a business carried on by the owner of the plant and machinery (subrule (1)), by a lessee of it, bound by covenant to repair, renew and yield up at the end of the term in good condition (subrule (2)), and by a lessee whose lessor undertakes the burden of restoring and renewing (subrule (5)). The general purpose of the detailed provisions of those subrules is to give effect to the above scheme. The dispute between the parties to the appeal is, first, whether or not the appellants were, as they claimed, entitled to the benefit of r. 6 (2), and, secondly, whether the language used by the legislature in 1907, when by the Finance Act, 1907, s. 26, it imposed the limitation rejected by WALTON, J., in *Hall (John) Junior & Co. v. Rickman* (2), did not go much further than the mere enactment of that limitation, and impose wholly new limitations, cutting down the benefits to the taxpayer intended by subrules (1), (2) and (5).

The following are the material facts, as found by the commissioners. The appellant company, incorporated in 1897, have since then built up a world-wide business in connection with the importation into the United Kingdom and sale here of meat from South America and elsewhere. Their capital is £12,000,000, of which £1,000,000, divided into 1,000,000 ordinary shares of £1 each, is held or controlled by Lord Vestey and Sir Edmund Vestey (referred to hereafter as the Vesteyes), who have

A in fact the voting control of the company. Prior to 1921, the Vesteyss had built up an immense business in America and elsewhere concerned with the raising or purchasing, and the preparation and transportation, of meat supplies, the assets of the concerns carrying on these productive and preparatory operations having a value of somewhere between £12,000,000 and £20,000,000 sterling. By a lease dated Dec. 29, 1921 (a copy of which was included in the special cases), the Vesteyss demised to the company for a term of 21 years (subject to certain options) the whole of the assets described in the 3 schedules attached to the agreement, consisting of lands, freezing works, cold stores, factories, mills and B other assets all over the world, at a rent of £960,000 sterling, payable to 3 persons in Paris. This rent escapes British taxation. It is the plant and machinery contained in these capital assets with which these appeals are concerned. The lease contains a full repairing covenant by the lessees (cl. 4) under which the lessees have the whole burden C of repairs and renewals, and undertake at the end of the lease to deliver up the whole of the demised premises, with all additions and improvements thereto, in good condition. For tax purposes, soon after the lease, a working agreement was made with the Inland Revenue to treat the businesses of all the leased concerns as one business, and to make upon D the company one comprehensive assessment covering the profits of them. Proper accounts were, and are, kept, both of each concern and of the whole business, allocations to revenue and capital accounts being correctly made, and revenue expenditure on the leased plant and machinery being allowed as a deduction before arriving at the figure E of the company's profits for assessment to income tax. Questions were raised before the commissioners as to whether the parties had not agreed in practice to disregard the repairing covenant, but at the beginning of para. 2 (H) of the case the commissioners say that "there has been no general agreement varying the terms of the lease" in regard to the obligation of repair. Any payments made by the lessors beyond their obligations F under the lease must, therefore, be regarded as gifts irrelevant for tax purposes: *Birmingham Corpn. v. Barnes* (3). The total amount at stake for the 12 years is £1,788,398, the annual figure varying from £126,570 in 1923-1924 up to £174,695 in 1929-1930.

G To appreciate the issues of interpretation raised by the Crown's contentions, close attention to the wording of the subrules (1), (2), (5) and (6) is necessary. Rule 6 (1) provides as follows:

H In charging the profits or gains of a trade under this schedule, such deduction may be allowed as the commissioners having jurisdiction in the matter may consider just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the trade and belonging to the person by whom it is carried on.

Rule 6 (2) provides as follows:

Where machinery or plant is let to the person by whom the trade is carried on, on the terms of his being bound to maintain the same and deliver it over in good

condition at the end of the lease, the machinery or plant shall be deemed to belong to that person for the purpose of this rule.

Rule 6 (5) provides as follows :

Where machinery or plant is let upon such terms that the burden of maintaining and restoring it falls upon the lessor, he shall be entitled, on presenting a claim to the general or special commissioners, to have repaid to him such a portion of the sum assessed and charged in respect of the machinery or plant, and deducted by the lessee on payment of the rent, as shall represent the tax upon an amount which the commissioners consider just and reasonable as representing the diminished value by reason of wear and tear of the machinery or plant during the year. No such claim shall be allowed unless made within 12 months after the expiration of the year of assessment. A

Rule 6 (6) provides as follows :

No deduction for wear and tear, or repayment on account of any such deduction, shall be allowed for any year if the deduction, when added to the deductions allowed on that account for any previous years to the person by whom the trade is carried on, will make the aggregate amount of the deductions exceed the actual cost to that person of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement, or re-instatement. B

By the words in r. 6 (1) "used for the purposes of the trade and belonging to the person by whom it is carried on," that subrule is restricted to the case where the owner is himself carrying on the trade. It is r. 6 (2) which the appellants say covers their case. There is no doubt that they come within the first words, and they contend that their claim is covered by the last words : C

. . . the machinery or plant shall be deemed to belong to that person [the repairing lessee] for the purpose of this rule. D

Apart from the argument addressed to us by the Attorney-General in regard to the reaction of r. 6 (6) upon the construction of r. 6 (2), with which I will deal presently, I think that this interpretation is correct. I construe the two lines as meaning that the repairing lessee shall have the benefit of the owner subrule. This construction appears to me to follow necessarily from a consideration of the nature of the enactment in r. 6 (1). It must be read as introducing a wholly new principle into income-tax law, although within narrowly defined limits. That was made apparent in sect. 12 of the 1878 Act by the opening words : E

Notwithstanding any provision to the contrary contained in any Act relating to income tax . . . F

So read, r. 6 (1) is the main enactment, applied to what is the normal case of the person carrying on the trade (the word in the subrule which replaces the word "concern" in the old sect. 12) owning both the concern and its plant and machinery. The case of the owner of the concern being a lessee was probably exceptional, but was included by the simple provision of subrule (2), and the much less simple provisions of subrule (5), according as the lessee or the lessor has the burden of supplying and maintaining the plant and machinery. The words "shall be deemed" in subrule (2) import a statutory supposition of fact of which the lessee is to get the benefit. He is to be treated notionally as being the owner G

- for the purpose of the new principle enacted in subrule (1). As that principle gives relief to the owner because, in carrying on the business, he has to purchase and use plant and machinery which wear out, so subrule (2), in my view, gives to the lessee who carries on the business with plant and machinery provided by the lessor under the obligations
- A of a full repairing covenant the same benefit as that which he would get under subrule (1) if he were owner. To this interpretation the only recorded answer of the inspector was a submission of fact that the repairing covenant was expressly or impliedly by conduct rescinded. This answer however, is negated by the finding of fact at the beginning of para. 2 (H)
- B to which I have already referred. No other reason was advanced by the inspector before the commissioners, and I think that I am right in saying that before us no real attempt was made on behalf of the respondents, apart from subrule (6), to challenge the interpretation of subrule (2) to which I have given expression.
- C The real argument of the Attorney-General was that by subrule (6) Parliament did a great deal more than amend the law as expounded by WALTON, J., in *Hall (John) Junior & Co. v. Rickman* (2) by introducing the 100 per cent. limitation upon "allowances for depreciation," which that judge was unable to construe out of the language of sect. 12
- D of the 1878 Act—now repeated in r. 6 (1), (2), (5). The Attorney-General did not dispute that the Finance Act, 1907, s. 26, the forerunner of subrule (6), was passed for the purpose of adding the limitation which WALTON, J., could not get out of sect. 12 of the 1878 Act. He contended, however, that, whether intentionally or not, the section had made another
- E change in the law by adding a wholly different restriction upon the rights of the lessee to which the owner was not bound. This result he found in the words "actual cost to that person" contained formerly in the Finance Act, 1907, s. 26, and now appearing in subrule (6). "That person" quite clearly is "the person by whom the trade is carried on."
- F Upon these words, the Attorney-General submits that the subrule should be construed as meaning that the lessee carrying on the trade is debarred from the benefit, under subrule (2), of deductions for wear and tear, unless "the actual cost" of the plant and machinery in question has been borne by him. I am anxious not to misrepresent his
- G argument, but I find it very difficult to appreciate how he gets his construction out of the language used. I do not challenge his rule of interpretation that, if we can discern a clear meaning in the language used, the court must not hesitate to apply it, even if we think it goes outside what seems to have been the purpose of the provision. I can follow
- H how the words of subrule (6) apply to the case of the owner who both incurs the cost and carries on the trade—that is, to the case of subrule (1)—but the language used does not seem to me capable of applying to the case of the lessee who is carrying on the trade on a full repairing covenant with plant and machinery, the property of the lessor, of which the whole "actual cost" was necessarily defrayed by the lessor. Still less

does it fit subrule (5). The Attorney-General frankly faces the consequence of his construction, however inconsistent it may be with the apparent intention of Parliament in 1878. He recognises that it involves the exclusion of a lessee carrying on the trade on a repairing lease from all benefit of subrule (2), except in so far as he may have voluntarily incurred the cost of installing plant or machinery at his own expense, or may have expended money in the way of capital expenditure on the machinery or plant by way of renewal, and so on. In my view, the language of subrule (6) will not bear the construction he puts on it. However, even if it were sufficiently near it to be even ambiguous, I should regard his construction as inadmissible. If subrule (2) between 1878 and 1907 gave the lessee the right to an allowance for depreciation of the lessor's plant and machinery in respect of which he (the lessee) had incurred no "actual cost," I cannot conceive of the legislature taking away the substance of that privilege, enjoyed for 29 years, without saying so in plain terms. If that be the purpose, as the Attorney-General contends, the language is hopelessly obscure, to say the least. I go further, and say that I am unable to get that meaning out of subrule (6). Accordingly, I reject that interpretation. Nor can I find any other ground in the language of subrule (6) for limiting or altering what I regard as the simple meaning of subrule (2).

This conclusion makes it, strictly speaking, unnecessary to consider the effect of the argument for the Crown upon subrule (5), for the appellants have nothing to do with that subrule. However, it is not irrelevant as a comment upon the argument to note that both the Attorney-General and Mr. Hills felt constrained to concede that their interpretation of subrule (6) involved the practical repeal of subrule (5). How far that subrule is affected by any other interpretation of subrule (6) may come up for consideration some day, and I say nothing upon that question now.

As my conclusion involves overruling the decision of FINLAY, J., in *Heyhoe v. Slough Theatre Co., Ltd.* (1), I will add a short explanatory comment. In that case, the judge had no assistance from the respondent company, which did not appear, and we have no record of Mr. Hills' argument except the judge's appreciation of its candid fairness. However, I infer from the terms of the judgment, at pp. 495, 496, that Mr. Hills had put forward the same argument as that which he and the Attorney-General addressed to us in the present case, and that the judge had assumed, without critically examining the language, the grammatical possibility of construing the subrule as imposing a money limitation upon the right to allowances, measured by the actual expenditure of the person carrying on the trade. Once that assumption is made, the results may, perhaps, follow logically as stated by the judge, but it is that assumption which, in my view, is erroneous. I do not think that it is within the meaning of the subrule. Such an interpretation would, as I have already indicated, involve a decision that in 1907 Parliament took away a large part of the benefits of the system of 1878 without disclosing

its purpose in clear terms. Such a construction would indeed be contrary to what I have always regarded as a first principle of interpretation—namely, that a statute must not be construed as taking away benefits already conferred by previous legislation unless that intention is plainly expressed. It cannot be inferred from ambiguous language. In my
 A view, that construction is actually inconsistent with the language of subrule (6). However, the most favourable view of it for the Crown is that the language is ambiguous, and that is not enough to justify a decision in favour of the Crown.

The order of the court should, in my opinion, be the same in each appeal
 B —namely, that the appeal be allowed, with costs here and below, and that the case be remitted to the commissioners with a direction that the appellant company be given the allowances for wear and tear mentioned in para. 2 (1) of the Simpson special case and para. 4 (1) of the Ellerker special case for the years there respectively mentioned.

C
 CLAUSON, L.J.: In this case, I find myself in agreement with the judgment of SCOTT, L.J., but, in view of the large sums at stake, and in view of the fact that we are differing from the view taken first by FINLAY, J., and next by MACNAGHTEN, J., I venture to express my conclusions,
 D and the reasons for them, in my own language. These are appeals by the Union Cold Storage Co., Ltd., whom it will be convenient to call the company, against judgments of MACNAGHTEN, J., on cases stated by the general commissioners for the city of London. The company claim certain deductions in respect of depreciation of leased plant. The com-
 E missioners, feeling themselves bound by a decision of FINLAY, J., in *Heyhoe v. Slough Theatre Co., Ltd.* (1), held that the company were not entitled to the deduction. The cited case was one in which the subject had failed to appear, and therefore the judge had not had the assistance of any argument by counsel against the Crown. MACNAGHTEN, J., after
 F full argument, came to the same conclusion on the construction of the statute as that of FINLAY, J., and affirmed the decision of the commissioners, and the question for us is in substance whether the conclusion of those two judges on the construction of the statute is correct.

The facts of the present case are fully stated in the judgment of
 G MACNAGHTEN, J., and may be shortly summarised thus. The company are lessees of a great deal of very valuable plant and machinery under a lease which binds them to maintain it and deliver it over in good condition at the end of the lease. As a matter of fact, owing to the very special relations which subsist between the lessors and the company, the bulk
 H (if not the whole) of the expenditure in the nature of capital expenditure on the machinery and plant by way of renewal, improvement or reinstatement has been made by the lessors, and not by the company. The terms of the lease have not, however, been varied, and the way in which the capital expenditure has in fact been borne has, accordingly, no bearing on the right to deduction claimed by the company. There can

be no doubt but that the value of the machinery and plant in question diminishes year by year, and the company claim a deduction under Sched. D, Cases I and II, r. 6 (1), (2). I need not read those subrules at length.

It is obvious that, had subrule (1) stood alone, the claim would not have been sustainable. The company carry on the trade for the purposes of which the machinery and plant are used, but the machinery and plant do not belong to them. The circumstances do, however, bring the case precisely within subrule (2), and, accordingly, reading subrules (1) and (2), it is clear that, so far, the company are entitled to the deductions claimed. No question of figures arises. The correct amount of the deductions, if legally to be allowed, has been settled. Accordingly, had this matter arisen before the Act of 1907, when it would have been governed mainly by the various statutory provisions now represented by subrules (1) and (2), there is no question but that the company's claim would necessarily have been successful. However, by the Act of 1907, an addition was made to the law by provisions which are now represented by r. 6 (6), the terms of which I need not read at length. The circumstances in which those provisions were enacted are stated by LORD ATKIN in the House of Lords in *Birmingham Corpn. v. Barnes* (3), at p. 297 :

In the year 1906, however, there arose a case before WALTON, J., of *Hall (John) Junior & Co. v. Rickman* (2), in which a shipowner claimed depreciation allowance in respect of a ship which, being used as a hulk, was held to be plant. The allowances had continued so long in respect of this ship that if granted for the tax year in question they would have exceeded 100 per cent. of the cost of the ship to the shipowner. The Inland Revenue authorities objected, but the judge, though thinking the objection reasonable, could find in the Income Tax Act no restriction on the aggregate of the allowances to be granted. He pointed out, as is conceded, that if the plant were sold the allowances would begin again on the value of the plant to the new owner. After this decision, and undoubtedly in consequence of it, there was passed in 1907 a section in the terms of the present rule 6 (6).

It is to be observed that, before the enactment of the provision which is now subrule (6), the allowance to be made, whether under the provision now embodied in subrule (1) or under that embodied in subrule (2), was in no way conditioned by, or related to, any matter of cost. What had to be considered was a comparison between value at the beginning of the year and value at the end of the year in so far as diminished by reason of wear and tear during the year. Subrule (6) modifies, in favour of the Crown, the provisions in subrules (1) and (2) by excluding the deduction which would otherwise be made under subrule (1) or (2) if it can be predicated of that deduction, if made, that, when added to certain previous deductions, the aggregate would exceed the actual cost of the machinery and plant in question to the person by whom the trade is carried on.

Subrule (6) contains words—namely, “or repayment on account of any such deduction”—which indicate clearly that it is intended to apply to the case in which the relevant provision in regard to wear-and-tear allowance is that which is now embodied in subrule (5). It was agreed by counsel on each side that the difficulties in the way of construing

subrule (6) in its application to a case governed by subrule (5) are exceedingly baffling. I say no more on this point, since it may be that it will have to be considered in some future case.

A It may well be that subrule (6) offers no difficulty in its application to a case to which subrule (1) applies, for in such a case the person by whom the trade is carried on *ex hypothesi* owns the plant and machinery, and in all normal cases the actual cost to him should be easily ascertainable. The problem for solution is, however, how to apply subrule (6) to the present case, which is governed by subrule (2). The case for the subject is put in two alternative ways. One suggestion, as I understand it, is B that, when the legislature says (as in subrule (2)) that the machinery and plant are to be deemed to belong to the lessee, this must be understood to mean that for all relevant purposes the lessee is to be placed in the shoes of the lessor, with the result that, if one is told (as one is by subrule (6)) to ascertain the actual cost to the lessee, one must regard the lessee C and the lessor as synonymous for this purpose, and one must take as the actual cost to the person by whom the trade is carried on the sum which is in truth the actual cost to the person who does not carry on the trade—namely, the lessor. If this view be correct, the appellant succeeds, since in this particular case the cost is very far in excess of the deductions D claimed. It may be that this view is correct, but I must admit that I feel some hesitation in reading so much into the words used in subrule (2).

The alternative view propounded by the subject, the lessee, is that, on its fair construction, rule 6 contemplates, and applies only to, (a) a case where the person by whom the trade is carried on has in fact received E deductions in previous years, (b) a case where there has been actual cost incurred by the person by whom the trade is carried on, and (c) a case where the addition of the proposed deduction to the previous deductions would cause the aggregate to overtop that actual cost, plus subsequent capital expenditure by way of renewal, and so on. This construction F appears to me to be a perfectly possible construction, and this reading of the subrule gives it exactly the meaning which one would expect the legislature to intend, if the object was to deal with the difficulty which came to light in *Hall (John) Junior & Co. v. Rickman* (2). It is true that, on this construction, it is not easy to see how effect can be G given to it in a case governed by subrule (5), but that difficulty admittedly exists on any possible construction of subrule (6). The result of this construction is that the limitation in favour of the Crown placed by subrule (6) upon the benefit conferred on the subject by subrules (1) and (2) fails to be an effective limitation in the case of the present H claimant for the benefit of subrule (2), since in his case the conditions for the application of subrule (6) do not exist, there having been no actual cost to him in respect of the machinery or plant.

The case for the Crown is put thus. It is pointed out that, even if there has been no actual cost of the machinery or plant to the person carrying on the business, there may well be, and in the present case

in fact there has been, some expenditure by the person carrying on the business in the nature of capital expenditure on the machinery or plant by way of renewal, improvement or reinstatement. The Attorney-General suggests that the subrule should read as though the words "if any" were inserted in the third line of the subrule between "deductions" and "allowed," and again in the fifth line of the subrule between the words "actual cost" and "to that person," and he argues that, where, as in this case, there is no actual cost, and even if there have been no previous deductions, the subrule applies, with the result that its true effect in such a case as this is to allow a deduction only if it does not exceed the expenditure by the person carrying on the trade in the nature of capital expenditure by way of renewal, improvement or reinstatement. A

It is well to pause and consider how, on this construction, the matter works out, first, in regard to the man who owns the machinery and plant with which he carries on his trade, and, secondly, in regard to the man who carries on his trade with machinery and plant let to him on terms that he must maintain it and deliver it over in good condition at the end of the lease. The first man gets his full allowance in respect of diminished value year by year, with a proviso merely that he is never to get back more than the cost of it, plus capital expenditure on it. In other words, he is deprived of the advantage which he would otherwise have had under the decision in *Hall's* case (2)—namely, the advantage that, if he had received an over-calculated allowance—an allowance which would write down the machinery and plant to nil, while there is still value left in it—he would still be entitled to go on getting an allowance for depreciation, and still retain the benefit of his over-calculated allowance. As regards him, subrule (6) operates merely to prevent him from gaining an obviously unintended benefit from an over-calculated allowance. As regards the second man, the subrule deprives him of the allowance, representing the diminished value of the machinery and plant, which subrule (2) gave him—and gave him (be it observed) notwithstanding that he had never himself owned the machinery—and cuts him down to an allowance measured by his own capital expenditure by way of renewal, improvement or reinstatement, a measure of very little relevancy in regard to the matter of diminution in value by wear and tear. Why the legislature, while remedying an undue benefit conferred on an owner of machinery by the operation of the decision in *Hall's* case (2) in reference to an owner whose allowance has been over-calculated, should take the opportunity of depriving a hirer of a benefit plainly conferred on him by enactments in operation from 1878 to 1907 I find it impossible to imagine. It must be admitted that the fact that an enactment, on a fair construction of it, produces an anomalous result is no ground for misconstruing it. Here, however, it is a case of a choice between two rival constructions. One produces a perfectly reasonable and intelligible result without depriving any subject of any benefit of alleviation of taxation, save only an obviously unintended and unexpected alleviation, and without adding any words B C D E F G H

to the subrule. The other construction, while it operates (as does the former construction) to right an anomaly to which attention had been drawn, just before its enactment, by the decision in *Hall's case* (2), further deprives one class of subjects—namely, hirers of machinery on the stated terms—of a benefit enjoyed for many years, and deprives them of it for no apparent reason, and actually involves reading in words (“if any” in two places) into the section, words no doubt easily to be read in to produce an intelligible result, but not, in my view, easily to be read in to produce an unexpected and anomalous result.

As between the two rival constructions of the subrule, that which most commends itself to me is the one which preserves to the hirer of machinery the privilege enjoyed from 1878 to 1907. It is perhaps not insignificant that this construction would appear to be that which has in practice been acted upon by the Revenue from 1907 until, at all events, a very recent date. Accordingly, in my judgment, the decision in *Heyhoe v. Slough Theatre Co., Ltd.* (1) proceeded upon an erroneous construction of subrule (6), and, in following that decision, the commissioners erred in point of law. The appeal to this court should succeed. I concur in the order to be made by this court as stated by SCOTT, L.J.

DU PARCQ, L.J.: I have had the advantage of reading in advance the judgments which have just been delivered. I entirely agree with them, and I cannot usefully add anything to them.

Appeal allowed, with costs in both courts. Leave to appeal to the House of Lords.

Solicitors: *Pinsent & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. TRING INVESTMENTS, LTD.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.J.J.), **March 7, 8, 16, 1939.**]

Income Tax—Undistributed income—“Member”—Permanent director with option to take up shares—Finance Act, 1922 (c. 17), s. 21 (7)—Finance Act, 1937 (c. 54), s. 14 (3).

The appellant company was a private company with a capital of £155, divided into 3,100 shares of 1s. each. These shares were divided into 600 five per cent. cumulative preference shares, 500 ordinary shares entitled to a dividend of 10 per cent., and 2,000 deferred shares. The articles provided for two persons to be first directors of the company, and they were empowered to appoint a permanent director for life, upon whom were conferred very large powers, including one to remove any other director from office without notice. Five days after the registration of the company, Q. was appointed permanent director, and, in consideration of £5, an option was given to him to take up at par any of the ordinary shares of the company. On the same day, 10

deferred shares at a premium of 19s. per share were allotted to P. Trust, Ltd., and 2 other preference shares were allotted at the same meeting. Eleven months later, the company went into liquidation, and, apart from the above 12 shares, the only shares allotted were 10 ordinary shares allotted to Q. immediately before the winding up. Shortly after the registration of the company, Q. entered into a deed of covenant to pay to the company for a period of 7 years or the remainder of his life, whichever should be the shorter period, an annuity of £11,000 per annum free of tax. That annuity was the only asset the company ever possessed, and the company received one payment of £11,000 (which, being free of tax, represented a gross sum of £14,426 4s. 7d.) before the date of the winding up. The commissioners gave a direction under the Finance Act, 1922, s. 21, and made an apportionment on Q. under the Finance Act, 1937, s. 14 (3), of £14,426 4s. 7d. It was contended that Q. had no right to the assets of the company unless and until he had exercised his option to take the ordinary shares, which he had not done:—

HELD: Q. was a member of the company within the meaning of the Finance Act, 1922, s. 21 (7), since he had an interest in the capital of the company.

Decision of MACNAGHTEN, J. ([1939] 1 All E.R. 148) affirmed.

[EDITORIAL NOTE.] In the ordinary way, the term “a member of a company” is synonymous with the term “shareholder,” but, for the purposes of the statutes relating to income tax, the term has been specially defined as “any person having a share or interest in the capital or profits or income of a company.” Even this definition was further extended in 1936, but that extension is not in question here. In the present case, the person sought to be assessed to tax had not at the material time any shares in the company, but had only an option to take up shares at par. It is held that such an option, given to the permanent director of what was virtually a one-man company, was an interest in the capital or profits or income of the company within the meaning of those words in the Finance Act, 1922, s. 21 (7).

AS TO “MEMBER” OF A COMPANY, see HALSBURY, Hailsham Edn., Vol. 17, pp. 290, 291, para. 576; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674r-674t.]

Case referred to:

(1) *Tennant v. Lord Advocate*, [1939] 1 All E.R. 672; Digest Supp.

APPEAL from a judgment of MACNAGHTEN, J., dated Nov. 14, 1938, and reported [1939] 1 All E.R. 148, where the facts are fully set out.

A. M. Latter, K.C., and F. Heyworth Talbot for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the respondents.

DU PARCQ, L.J. [delivering the judgment of the court]: In these appeals, the appellant companies ask that two orders made by MACNAGHTEN, J., may be reversed by this court. It was agreed at the bar that our decision in the case of *Tring Investments, Ltd.*, must govern the case of *Peeverell Trust, Ltd.*, and accordingly the argument was confined, as is this judgment, to the former case.

By the Finance Act, 1922, s. 21, the legislature, “with a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise

be distributed," gave wide powers to the commissioners to treat undistributed income of a company as if it were the income of the members, and to apportion the amount thereof among the members. By sect. 21 (7), it is provided as follows :

A . . . the expression " member " shall include any person having a share or interest in the capital or profits or income of a company.

By Sched. I, para. 9, the apportionment is to be made " in accordance with the respective interests of the members." The Finance Act, 1937, s. 14, gave further powers to the commissioners in relation to investment companies, and sect. 14 (3) provided that, in apportioning income to B members, they might, if it seemed proper to them to do so :

. . . attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up.

In the present case, the commissioners gave a direction under the C Finance Act, 1922, s. 21, that undistributed income of the company should be deemed to be the income of the members, and the propriety of this direction is not questioned. The commissioners further apportioned by far the greater part of this income to the Marquess of Queensberry. It was contended on behalf of the company (i) that the Marquess D of Queensberry was not at the material time—that is, in the fiscal year 1936-1937—a " member " of the company within the definition cited above, and (ii) that he could not be said to have an interest in the assets of the company within the Finance Act, 1937, s. 14 (3). These contentions found favour with the commissioners for the special pur- E poses of the Income Tax Acts, but, on the hearing of a case stated for the opinion of the court, MACNAGHTEN, J., held that they failed, and that the apportionment was rightly made.

The facts are fully set out in the case stated, and in the judgment of the judge, and we do not propose to repeat them. It is plain that the F Marquess of Queensberry had, at the material time, a legal right to call upon the company to allot to him all the ordinary shares which might be issued by the company on payment of 1s. per share, and that, if the company had ever manifested an intention to issue the shares to another person, he would have been entitled to an injunction re- G straining it from so doing. Further, if there had been a winding up on Apr. 5, 1937, the Marquess of Queensberry would have been entitled to almost the whole of the assets of the company against payment of what may fairly be called a nominal sum. The alternative open to him would have been to allow the sum of approximately £11,000 provided H by himself to be taken by the Crown. In these circumstances, we cannot doubt that the judge was right in deciding that the Marquess of Queensberry was in 1936-1937 a person having an " interest " in " the capital or profit or income " of the company, and that he then had an " interest in the assets of the company available for distribution among the members in the event of a winding up." The word " interest," as was

said recently by LORD RUSSELL OF KILLOWEN in the House of Lords, is "a word capable of wide meaning" (*Tennant v. Lord Advocate* (1)), and there is certainly nothing in the words of the Finance Act, 1922, to encourage the courts to place a restricted meaning upon it. On the contrary, it seems to us to be plain that, by giving an extended meaning to the word "member," the legislature was at pains to bring within the scope of its remedial legislation such a case as this, where a company has so arranged its affairs that the person who in fact and in law has the most substantial interest in its assets is nevertheless not a shareholder. A

We should perhaps deal specifically with the argument which was pressed on behalf of the company that the words of sect. 21 (7) must, as it was put at the bar, be "read distributively"—that is to say, as if the draftsman had said "a share in the capital or an interest in the profits or income." Some criticism was directed to the reasoning which led the judge to reject this argument. It will suffice to say that, in our view, there is nothing in the context to suggest that the proposed construction should be put upon the words. On the contrary, in order that the intention which the legislature has clearly expressed in sect. 21 (1) may be fulfilled, it is proper to read the words which they have used in the later subsection without placing any artificial limitation on what appears to us to be their plain meaning. The argument was based in part on a supposed canon of construction of general application, whereby such a combination of words as is found here must always be "read distributively." No authority for the supposed rule was produced. D
Indeed, we were told very frankly that the researches of counsel had failed to discover any such authority. In truth, there is no such rule. E
For these reasons, we are of opinion that the decision of MACNAGHTEN, J., was right. It follows that both these appeals must be dismissed with costs.

Appeals dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Palmer, Bull & Mant* (for the appellants); *Solicitor of Inland Revenue* (for the respondents). F

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re AN ARBITRATION BETWEEN KAWASAKI KISEN KABUSHIKI KAISHA AND BELSHIPS CO., LTD., SKIBSAKSJESELSKAP. G

[KING'S BENCH DIVISION (Branson, J.), **March 8, 1939.**]

Shipping—Charterparty—Exceptions—Liberty to cancel should certain powers become engaged in war with one another—Time within which option should be exercised—Implied term—Reasonable time. H

By a charterparty dated Apr. 23, 1937, the owners of the *Belpareil* chartered their ship to the plaintiffs on a time charter. Clause 30 of the charterparty was in the following words: "In case Japan, Norway, China, U.S.A., or any of the great European Powers should become engaged in war with any other of these countries owners and/or charterers

have the option of cancelling charterparty." The Belpareil entered upon her service on July 21, 1937, and on Apr. 2, 1938, the charterers purported to cancel the charter under cl. 30, on the ground that Japan and China had become engaged in war with one another. Hostilities between China and Japan commenced in July, 1937, and by the beginning of Sept., 1937, they were engaged in a war within the ordinary and popular meaning of that word, and remained so engaged throughout the period up to Apr. 2, 1938. The owners contended that there must be imported into the contract a term that the option should be exercised within a reasonable time, and that the charterers had not exercised it within a reasonable time. The charterers contended that, on the true construction of cl. 30, either party was entitled to exercise the option at any time during the continuance of a war :—

HELD : (i) the contract must be construed on the same principle as that applicable to a commercial contract, and, the contract being silent as to the period of time within which the option must be exercised, there must be implied a term that the option should be exercised within a reasonable time.

(ii) a reasonable time for the exercise of the option had elapsed before Apr. 2, 1938.

[EDITORIAL NOTE.] It is the general rule that, where a contract is silent as to the time at which an act must be performed, it must be performed within a reasonable time. At the same time, the court will not imply a term in a contract unless it is reasonably clear that the parties must have intended at the date of the contract that the term sought to be implied should be a term of their agreement. In the present case, the court has found that the parties must have so intended.

AS TO CANCELLATION CLAUSE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 298, 299, para. 491 ; and FOR CASES, see DIGEST, Vol. 41, p. 351, Nos. 2005, 2006.]

Cases referred to :

(1) *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592 ; 12 Digest 611, 5052 ; 87 L.J.K.B. 724 ; 118 L.T. 479.

(2) *Moel Tryvan Ship Co., Ltd. v. Weir (Andrew) & Co.*, [1910] 2 K.B. 844 ; 12 Digest 307, 2537 ; 79 L.J.K.B. 898 ; 103 L.T. 161.

APPEAL by way of special case stated from the decision of the umpire in an arbitration between the claimants, the charterers of the Belpareil, and the respondents, the Belships Co., Ltd., Skibsaksjeselskap. The facts are fully set out in the judgment.

Gilbert J. Paull, K.C., and *P. Devlin* for the claimants.

Sir Robert Aske, K.C., and *Cyril Miller* for the respondents.

BRANSON, J. : The facts of this case may be quite shortly stated from the special case. There was a time charter, dated Apr. 23, 1937, under which the owners chartered the Belpareil to the charterers for 18 months from the time of delivery, and the charterers had, by the terms of the charterparty, an option to extend the period, which option they exercised on July 14, 1937. Clause 30 of the charterparty contained a paragraph which reads as follows :

In case Japan, Norway, China, U.S.A., or any of the great European Powers should become engaged in war with any other of these countries owners and/or charterers have the option of cancelling charterparty.

The Belpareil entered upon her service on July 21, 1937, and, after a certain amount of correspondence, the charterers' London agents,

on Apr. 2, 1938, purported to cancel the charter under cl. 30. The owners took up the position that the charterers' option to cancel the charter had expired because it had not been exercised within a reasonable time, and the question at issue in the arbitration was whether or not on Apr. 2, 1938, the charterers were entitled to cancel the charterparty.

The arbitrator has found that on July 8, 1937, there occurred the first of a series of incidents involving fighting between Chinese and Japanese detachments. Within a short time, the conflict between China and Japan developed into a campaign of a major character. So far as events up to the middle of September are concerned, the parties agreed that the statement of facts which is annexed to the arbitrator's award is accurate. As to events between Sept., 1937, and Apr. 2, 1938, it was further agreed between the parties that no material alteration had taken place, except that the Chinese Ambassador left Japan on Jan. 20, 1938, and the Japanese Ambassador left China on Jan. 28, 1938. Then the arbitrator goes on to find as follows :

On Jan. 16, 1938, the Japanese government declared that it would thenceforth cease to have any dealings with the Chinese national government and acted accordingly up to Apr. 2, 1938. Up to May 4, 1938, M. Tani who holds the rank of a Minister was resident in Shanghai and was described by the Japanese government as being in charge of the Japanese Embassy in China. Up to May 20, 1938, there had been no formal severance of diplomatic relationship between China and Japan.

In those circumstances, the solicitors for the owners inquired of the Foreign Office as to what the position was, and the answer is set out in para. 9 of the special case :

... the situation in China is indeterminate and anomalous and His Majesty's government are not prepared to say that in their view a state of war exists ... the meaning to be attached to the term "war" as used in a given document may simply be one of interpreting the relevant clause, and ... the attitude of His Majesty's government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term "war" as used in particular documents or statutes.

The award states further as follows :

The charterers further relied on the fact that on Jan. 27, 1938, the award of Sir Robert Aske, K.C., M.P., in a dispute between the charterers and the Bantham Steamship Co., Ltd., was published containing a decision (subject to the opinion of the court) that by Sept. 18, 1937, there was war between China and Japan in the sense intended by a clause contained in the charterparty under discussion in that case which was similar to that quoted in para. 1.

That decision was upheld by GODDARD, J., sitting in this court, and has now been upheld by the Court of Appeal. I am told that there is still a possibility that leave to appeal to the House of Lords may be obtained, and that the decision of the Court of Appeal may be contested in the House of Lords, in which event the parties to this proceeding desire to reserve to themselves the opportunity of further discussion of the question whether or not a war did exist within the meaning of that word as used in the charterparty now under discussion. The arbitrator found as follows in para. 14 :

So far as it is a question of fact I find that by the beginning of Sept., 1937,

China and Japan had become engaged in war and remained so engaged throughout the period up to Apr. 2, 1938.

He also finds as follows in para. 15 :

The military operations between China and Japan from the beginning of Sept., 1937, to Apr. 2, 1938, constituted a war in the ordinary and popular meaning of that word between China and Japan.

A Moreover, he finds that a reasonable time for the exercise of the option given by the cancellation clause had elapsed before Apr. 2, 1938, and, therefore, subject to the decision of this court, he held that the charterers were not, on Apr. 2, 1938, entitled to cancel the charterparty.

B The contention before me is, first of all, that, upon the true construction of the material words in cl. 30, the parties have agreed that, if at any time there exists a state of war between any of the countries mentioned, so long as that war continues, the option of cancelling the charter also continues to reside in either the owners or the charterers.

C I am not able to agree with that construction. It seems to me that, upon the construction of the material words, the agreement is that (taking any two of the countries), should Japan and China become engaged in war with each other, an option immediately arises for exercise by either the charterer or the owners of the ship. Then it is said that,

D unless one is to import by implication some limitation of the time for which that option is to run, or within which that option may be exercised, the option may continue so long as the war continues, and it is said, on the one hand, that there must be implied into the contract the usual clause that that for the doing of which no time is fixed has got to be done within a reasonable time. Then Mr. Paull says that that is all very well in the ordinary case. No doubt the law will imply a reasonable time for the doing of a contractual obligation if no time is fixed, unless it appears that there are reasons why such an implication should not be made.

F The law as to implying terms in contracts has so often been stated that, if it were not for the fact that one is always being pressed to imply this, that, or the other term in contracts, I should hesitate to quote any authority upon the matter at all. However, as it always seems to me to be most important that the courts should abstain from implying terms into contracts unless it is perfectly plain that the parties really intended the contract to have that term, I fortify myself by reading again a passage out of the judgment of SCRUTTON, L.J., in *Reigate v. Union Manufacturing Co. (Ramsbottom)* (1), at p. 605 :

H The first thing is to see what the parties have expressed in the contract ; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract ; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen ; we did not trouble to say that ; it is too clear." Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

If I may respectfully say so, I am not only bound by that statement of the principle, but I also most heartily agree with it. Thus, the question that one has to consider here is whether or not, if the point had been raised when these owners and these charterers were writing out this clause relating to the option, and one of them had asked, "Within what period is the option to be exercised?" it would immediately have been agreed between the parties: "Of course it must be exercised within a reasonable time." Unless one can come to the conclusion that that would have happened, then no doubt it is wrong to import the term that the option should be exercised within a reasonable time. However, having given as much weight as possible to the arguments of Mr. Paull, I have come to the conclusion that that is just what the parties would have done. Mr. Paull very ingeniously tries to argue that they would have considered all the difficulties that there might have been, first in ascertaining that war had broken out, and then in deciding whether it would be to the advantage of one or the other of them to give notice of cancellation of the charterparty. I do not think that that is the way in which they would have approached the matter at all. It seems to me that the ordinary rule that one applies in the case of a commercial contract where no time is fixed is applicable to the present case, because what the parties would have had to decide, if and when a war broke out, would have been whether or not, in view of the outbreak of war, it was their desire to go on with this contract. As Sir Robert Aske put it, no doubt what is contemplated by people who are envisaging the outbreak of war between great Powers is that there will immediately be such a dislocation of business as to make it right that both parties to a contract shall have a right of reconsidering their position and determining whether or not, in the changed circumstances—that is to say, in view of the outbreak of war—they are prepared to go on implementing a contract which was made in peace time and was intended to be operative in peace time.

This contract falls within the same principle as that which is applied as I have said, to commercial contracts in the ordinary way. The principle is stated by FARWELL, L.J., in *Moel Tryvan Ship Co., Ltd. v. Andrew Weir & Co. (2)*, at p. 855:

If the contract were silent as to the period of time within which the option must be exercised, then I think it clear that there would be an implied term that the option should be exercised within a reasonable time . . . and if so, this would be a question of fact for the jury. . . . They would be directed that the charterers were entitled to a reasonable time in which to ascertain the relevant facts necessary to enable them to make up their minds. . . .

In other words, the charterers and the shipowners would be entitled here to a reasonable time within which to ascertain that war had broken out, and within which to consider and decide the question whether or not, seeing that war had broken out, they thought it was in their interest to continue to implement the contract. The question of fact has been decided by the arbitrator against the charterers. He has found that

a reasonable time had expired by Apr. 2, 1938, when the charterers purported to give notice of cancellation of the charterparty, and he has consequently decided against them. This appeal fails, and, in my view, the arbitrator's award was correct, and should be upheld.

A Solicitors: *Thomas Cooper & Co.* (for the claimants); *Sinclair, Roche & Temperley* (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

B *SHIRLAW v. SOUTHERN FOUNDRIES (1926), LTD., AND
FEDERATED FOUNDRIES, LTD.*

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Goddard, L.JJ.), **February 15, 16, March 17, 1939.**]

C *Companies—Directors—Managing director—Contract appointing managing director for a term of years—Change of articles—Directorship of managing director terminated before expiration of term—Breach of contract—Implied terms.*

D S. was appointed managing director of S.F., Ltd., for a period of 10 years, the agreement being dated Dec. 21, 1933. The articles of that company, as they existed on that date, gave power to the company to appoint one of the directors as managing director, and provided that the managing director should be subject to the same provisions as to removal and resignation as those to which the other directors were subject, but "subject to the provisions of any contract between him and the company." In Apr., 1936, S.F., Ltd., adopted a new set of articles, owing to F.F., Ltd., having acquired financial control of S.F., Ltd. The new articles gave power to F.F., Ltd., to remove from office any director of S.F., Ltd. On Mar. 25, 1937, F.F., Ltd., removed S. from his office of director of S.F., Ltd., and his appointment as managing director *ipso facto* terminated. It was contended that an implied term to the effect that S.F., Ltd., would not remove S. from his office of director could not be read into the contract:—

E **F** HELD (SIR WILFRID GREENE, M.R., dissenting): the removal of S. from his office of director was a breach of contract on the part of S.F., Ltd., as it was an implied term of the contract that S.F., Ltd. would not by any alteration of its articles create any right to remove S. from his position as director.

G [EDITORIAL NOTE. The judgments of the majority of the court in this case would appear to express the general view of practitioners of the law applicable to the state of facts here disclosed. The contrary view taken by SIR WILFRID GREENE, M.R., may at first sight be a little surprising, but it has considerable support from the decision of the Court of Appeal in *Bluett v. Stutchbury's, Ltd.* (3). In that case, the director who had been appointed managing director for a term of years failed before the expiration of that time to secure re-election as a director, and it was held that the directors had no power to appoint a man managing director for a term of years, whether or not the company re-elected him a director. The distinction between the two cases is not dealt with in the judgments herein, and it is left for a future decision to state the precise distinction between them.

H AS TO MANAGING DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, p. 348, para. 575; and FOR CASES, see DIGEST, Vol. 9, pp. 528-532, Nos. 3484-3513.]

Cases referred to:

(1) *Stirling v. Maitland* (1864), 5 B. & S. 841; 12 Digest 616, 5091; 34 L.J.Q.B. 1; 11 L.T. 337.

- (2) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73; 60 L.T. 654.
- (3) *Bluett v. Stutchbury's, Ltd.* (1908), 24 T.L.R. 469; 9 Digest 529, 3491.
- (4) *Nelson v. Nelson (James) & Sons, Ltd.*, [1914] 2 K.B. 770; 9 Digest 529, 3492; 83 L.J.K.B. 823; 110 L.T. 888.
- (5) *Fowler v. Commercial Timber Co., Ltd.*, [1930] 2 K.B. 1; Digest Supp.; 99 L.J.K.B. 529; 143 L.T. 391.

A

APPEAL by the defendants from a judgment of HUMPHREYS, J., dated June 16, 1938. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

Cyril Radcliffe, K.C., and *Valentine Holmes* for the appellants.

B

F. R. Evershed, K.C., and *John P. Ashworth* for the respondent.

Radcliffe, K.C.: The essence of the managing director's agreement, according to the articles, was that he was to be one of the directors. It is not an agreement as to the tenure of the office of director at all. There cannot be an agreement that a person shall be a managing director when he is not a director. Art. 91 of the company's articles says that he shall cease to be managing director if he ceases to hold the office of director, and it is impossible to extract from the agreement any contracting out of the provisions of art. 91. Art. 105 gives the company power to remove any ordinary director, and this article must apply to a managing director. If a man ceases to be a director, he cannot complain that he is removed from his position as managing director, because he has failed to maintain the necessary qualification. The contract in the present case leaves the respondent's position as director absolutely untouched. A contract appointing a managing director is not primarily a contract of service, but is one by which the person bound to give his services must hold a certain office. If, for any reason, he ceases to hold the essential qualification of being a member of the board, the contract comes to an end. Was the respondent by this contract given a greater security of tenure than that which was given to the other directors? There is no reference to it in the contract. [Counsel referred to *Bluett v. Stutchbury's, Ltd.* (3) and *Nelson v. James Nelson & Sons, Ltd.* (4).]

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Evershed, K.C.: There is no question at all as to whether or not it would be within the powers of the company to appoint a managing director on the terms that he should not be entitled to resign, and that the company could not terminate the appointment by removing him. It was within the competence of the company, acting through its directors, to contract that neither party should arbitrarily determine the agreement. If that is right, it is necessary to see what the contract says, and then to look at the articles to see if the two things are in accordance with each other. Mr. Shirlaw was appointed managing director for 10 years, but a vacation of office by him owing to serious illness was not to be a breach of the agreement. It would be unlawful to contract out of the qualification requirement, by reason of the Companies Act, 1929, s. 141 (3). Neither party to the agreement contemplated its termination by the

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other party. *Prima facie*, the effect of cl. 2 of the agreement is that it would be a breach of contract if the company were to remove Mr. Shirlaw from his office of director. *Fowler v. Commercial Timber Co., Ltd.* (5) shows that, apart from any breach of the agreement by the managing director, the company was not entitled to bring his appointment to an end. In *Nelson v. James Nelson & Sons, Ltd.* (4), SWINFEN EADY, L.J., cites PALMER'S COMPANY PRECEDENTS, 11th Edn., Part 1, p. 798, and states that, where there is power to appoint for a fixed term, with power to remove or dismiss, it means power to remove or dismiss subject to the terms of the existing contract between the managing director and the company. If a third party intervenes to put an end to an existing contractual relationship, he is liable in damages. If the contract is construed according to its language, it involves a promise by the company relating to the office of director. By permitting the office of director held by the respondent to become vacant the company has committed a breach of its obligation.

Ashworth followed on the same side.

Radcliffe, K.C., in reply: The contract can only mean that the respondent shall hold the office of managing director so long as, and no longer than, he is a director. Once it becomes plain that there is an implied qualification upon the words of the promise, there is an equivalent implied promise that the respondent will act as managing director only so long as he continues to be a director. The words of the contract do not mean that the respondent shall be managing director whether or not he is a director. Unless the court construes the act of Federated Foundries as being the act of Southern Foundries, there is nothing to suggest that the contract was broken. It is impossible to attach any importance to the suggestion that the change of articles was a factor contributing to the alleged breach by the company. It is not possible, even by making any implication, to find the company liable for breach of contract, in the events which have happened. [Counsel referred to *Bluett v. Stutchbury's, Ltd.* (3).]

SIR WILFRID GREENE, M.R.: This is an appeal from a judgment of HUMPHREYS, J., sitting without a jury, by which the respondent, who was the plaintiff in the action, was awarded the sum of £12,000 by way of damages against the appellants. The respondent's claim against the first defendants, Southern Foundries (1926), Ltd. (which I will call Southern), was based on alleged wrongful dismissal from the office of managing director which he held in Southern. As against the second defendants, Federated Foundries, Ltd. (which I will call Federated), the claim was based on an allegation that Federated had wrongfully procured Southern to dismiss the respondent from his office. It was not disputed before us that, if the claim against Southern were well-founded, Federated was also liable, for the reason alleged. The appellants before us challenged the judgment of HUMPHREYS, J., on the ground that the

dismissal which admittedly took place was not wrongful. Alternatively, they say that the damages ought to be reduced.

The agreement by which the respondent was appointed managing director of Southern is dated Dec. 21, 1933. At that time, all, or practically all, the shares in Southern were held by or on behalf of Sir Berkeley Sheffield, who was a party to the agreement. The respondent, who was a director of Southern, had a large interest in a company called Steel Parts, Ltd. The agreement recited that Southern (therein called the company) was

... desirous of appointing Mr. Shirlaw to be managing director and Mr. Shirlaw has agreed to accept the appointment for the consideration hereinafter mentioned and also in consideration of Sir Berkeley Sheffield providing further finance for Steel Parts Ltd. to the extent hereinafter specified.

Clauses 1 and 2 of the operative part provided as follows :

(1) Mr. Shirlaw shall be and he is hereby appointed managing director of the company and as such managing director he shall perform the duties and exercise the powers which from time to time may be assigned to or vested in him by the directors of the company. (2) Mr. Shirlaw shall hold the said office for the term of 10 years from Dec. 1, 1933.

By cl. 3, the respondent agreed that, unless prevented by ill-health, he would

... throughout the said term devote the whole of his time attention and abilities to the business of the company [subject to cl. 10] ...

He also agreed by that clause that he would comply with the orders of the board, and that he would well and faithfully serve the company and use his utmost endeavours to promote its interest. Under cl. 4 and 5, the respondent was to receive remuneration on a fixed scale, plus a commission on the net profits of the company. By cl. 8, the company was empowered by written notice to determine the agreement if the respondent failed for 6 months to fulfil his obligations to the company thereunder. Clause 9 provided that the respondent should have no claim for damages if his "tenure of office" should be determined by winding up the company. By cl. 10, the respondent was given the right to do a certain amount of work for Steel Parts, Ltd. By cl. 11, he was prohibited, during the continuance of the agreement and a further period of 3 years, from carrying on, or being engaged in, any foundry business within 100 miles of the company's works at Croydon. By cl. 12, he undertook not to solicit or deal with certain customers, or to represent himself as connected with, or interested in, the company at any time after the termination of the agreement. By cl. 13, Sir Berkeley Sheffield agreed to pay the respondent £300 in respect of his living expenses in London during the first 6 months of the agreement, and his costs of removal to London. By cl. 14, Sir Berkeley Sheffield and the respondent each agreed to subscribe and pay for 2,000 £1 preference shares in Steel Parts, Ltd. By cl. 15, the respondent agreed to purchase Sir Berkeley Sheffield's preference shares in Steel Parts, Ltd., upon any breach by the respondent of his obligations in respect of the company under the

agreement. By cl. 16, Sir Berkeley Sheffield gave the respondent the option at any time to purchase his preference shares in Steel Parts, Ltd.

- On Apr. 17, 1936, a special resolution of Southern was passed, adopting new articles of association. At that date, Federated had become the beneficial owners of all, or practically all, the shares in Southern. By art. 8 of the new articles, Federated was empowered to remove from office by an instrument in writing subscribed on its behalf by two of its directors and its secretary any director of Southern, such instrument to take effect as from the time of its deposit at the registered office of Southern. This power was exercised against the respondent by an instrument in writing dated Mar. 25, 1937, which was deposited at the registered office of Southern on or about Mar. 27, 1937. The effect of this operation was that the respondent ceased to be a director of Southern as from the deposit of the instrument, and, as a consequence, he ceased to be managing director of Southern. A managing director is a director with powers of management delegated to him by the board of directors, and it is an essential requirement of his office as managing director that he should hold the office of director. A managing director who is not a director is a contradiction in terms. It is for this reason that the common form articles provide (as the articles of Southern in force at the date of the agreement did provide) that a managing director must be appointed from among the directors, and shall cease to be managing director if he ceases to hold the office of director. Accordingly, it would have been *ultra vires* the board of Southern to appoint the respondent as managing director upon the terms that he should continue to be managing director after he had ceased to be a director, and the agreement, if it had purported so to provide (which it did not), would to that extent have been inoperative.

- Mr. Radcliffe, for the appellants, contended that, according to the true construction of the agreement, the termination in the manner stated of the respondent's tenure of office as director of Southern was not a breach of the agreement by Southern, notwithstanding the fact that it necessarily involved the termination of the respondent's tenure of office as managing director. His main argument was that the agreement contained no express or implied undertaking on the part of Southern either that the respondent should retain his office of director during the term of the agreement or that Southern would not terminate his tenure of that office. He argued, secondly, that, even if the agreement be construed as containing such an express or implied undertaking, there has been no breach of it by Southern, since the respondent's tenure of directorship was terminated, not by Southern, but by Federated.

Mr. Evershed, on behalf of the respondent, on the other hand, in answer to the appellants' main argument, disclaimed any intention of reading into the agreement an implied term either to the effect that during the 10-years period the respondent should hold the office of director or to the effect that during the term Southern would do nothing to remove him

from the office of director. For reasons which will appear later, it would not, in my opinion, be legitimate to imply any such term, and Mr. Evershed was right in not seeking to do so. He said, however, that the agreement expressly provides that the respondent is to hold the office of managing director for 10 years, and that this means that he is to be both a director and managing director for that period. He admitted, however, A that the language does not import an undertaking by the company in the nature of a guarantee that the respondent shall in any event hold both offices for 10 years. He argued that it was unnecessary for him to specify what qualification is to be applied to the words "shall hold the said office [of managing director] for the term of 10 years" so as to B make them something less than such a guarantee, and contented himself with asserting that, whatever the true qualification might be, it could not include the case where it was the action of Southern that terminated the tenure of the directorship. In answer to the appellants' second argument, Mr. Evershed maintained that it was in truth the action of Southern C which led to the respondent's dismissal from the office of director, since by altering its articles Southern placed it in the power of Federated to bring about his dismissal.

The office of managing director is of a very special kind, and an agreement appointing a managing director cannot be treated as an ordinary service agreement, as in the case of a mere manager. A managing director is, as I have said, a director to whom the board, being empowered to do so by the articles of association, delegates its powers of management, or some of them, and this delegation is usually, if not invariably, made subject to the overriding authority of the board. Management here E means the management of the company's business, or part of it, as the case may be. There is no delegation of the remaining powers of the board. Such important matters as (to take a few examples) the financial policy of the company, the dividends to be declared, and the issue of new shares are all reserved to the board. The result of this is that it is by F no means a foregone conclusion that a company or its board will be willing to bind itself to keep as a director a member of the board whom it considers suitable to be a managing director. A director may be an excellent manager, and therefore well qualified to be a managing director, but he may turn out to be an undesirable member of the board in other respects. G It is for this reason that, in my opinion, it is impossible, in an agreement appointing a managing director, to imply that he shall hold, or not be removed from, the office of director during the period for which he is appointed managing director. The office of director is one thing, and the office of managing director is a different thing. In every case where a H managing director is appointed, he is necessarily appointed for a period. In many cases, there is no written agreement, the terms of the appointment being found in a resolution of the board. In such a case, the minimum period of the appointment, if not specified in the resolution, would have to be ascertained on ordinary principles. In any case,

however, there would be a minimum period, and I have never, before the present case, heard it suggested, nor do I think it possible to suggest, that, by merely appointing a director to be managing director for a period, however short or however long, the company impliedly binds itself to keep him in, or not to remove him from, the office of director.

- A Another matter which must be borne in mind in considering an agreement appointing a managing director is the fact that the powers of the board to make the appointment are limited to those conferred by the articles. By art. 91 of the original articles of Southern, which were in force when the agreement was made, the directors were empowered to
- B make a contract appointing a managing director which excluded the operation of the provisions of the articles relating to resignation and removal of a director. Resignation is dealt with in art. 89 (F) and removal in art. 105 (where the word "ordinary" must, I think, mean a director not appointed by debenture holders under art. 86), and possibly in art.
- C 89 (E). Moreover, the reference in art. 89 to "the terms of any subsisting agreement" must, I think, imply a power in the directors to appoint a managing director upon the terms that, during the period of the appointment, some, at any rate, of the other provisions of that article as to the vacation of the office of director are not to apply. It was, therefore,
- D within the power of the board in appointing a managing director to provide in the agreement (i) that he should not be entitled to resign his office as director, (ii) that the power to remove him from that office should not be exercised, and (iii) that his office as director should not be vacated in some, at any rate, of the other ways specified in art. 89. If
- E the directors of Southern, when they appointed the respondent to be managing director, had wished to exercise the power to make such a provision, I should have expected them to say so expressly in the agreement, and I should have expected them to specify in terms which of the various causes determining the respondent's tenure of his directorship
- F were to be excluded from applying. Even on Mr. Evershed's argument, this latter point is left completely in doubt, since he declined to commit himself beyond saying that resignation and removal were excluded. However, although I should have expected to find an express exclusion in the agreement, I do not think that the reference to "the provisions
- G of any contract" in art. 91 and that to "any subsisting agreement" in art. 89 necessarily require an express exclusion to make the agreement *intra vires*. It would be sufficient if the agreement by necessary implication excluded resignation or removal or any of the other matters. Thus we are brought back to the question whether or not, upon its true construction,
- H the present agreement relieves the respondent from the possibility of removal from his directorship.

At the risk of repetition, I must again point out the importance of bearing in mind that the office of director and that of managing director are quite different. A managing director must be a director, since the tenure of that office is a *sine qua non* to his tenure of the office of managing

director, but an agreement appointing a director to be managing director, whether the period of his appointment be short or long, does not, and cannot, of itself mean that he is to hold the office of director during the whole of that period. An appointment to the office of managing director for a period assumes that the person appointed will remain a director during that period. It does not ensure it any more than the appointment of a member of a club to be president of the club for a period ensures that he will remain a member of the club for that period, although it assumes that he will. In some forms of the common article which provides for the appointment of a managing director, there is no such power as exists in the present case by virtue of the words "subject to the provisions of any contract" to exclude the operation of provisions in the articles relating to removal from the office of director: PALMER'S COMPANY PRECEDENTS, 15th Edn., Vol. 1, p. 693, form 97, note. If Mr. Evershed's argument is right, an agreement appointing a managing director for a fixed term would, in a case where such a form was adopted, be *ultra vires* the board, since, on its true construction (and this is a question of construction), it would be providing that, during the term, the person appointed should not be subject to removal from his directorship. The true view, in my opinion, would be, not that the agreement was *ultra vires* the directors, but that, upon its true construction, it did not exclude the power of removal.

The agreement of Dec. 21, 1933, falls into four divisions. These are (a) the clauses (ccl. 1-10) relating to the appointment of the respondent to the office of managing director and to his rights and duties as such, (b) the clauses (ccl. 11 and 12) which impose restrictions upon him during and after the termination of the agreement, (c) the clause (cl. 13) under which Sir Berkeley Sheffield agrees to pay certain expenses of the respondent, and (d) the clauses (ccl. 14-16) relating to shares in Steel Parts, Ltd. Of these, (c) and (d) embody agreements between Sir Berkeley Sheffield and the respondent. Southern is not concerned with them, but the provision of finance by Sir Berkeley Sheffield for Steel Parts, Ltd., is part of the consideration for the respondent's agreement to accept the appointment as managing director.

Taking the group of clauses under head (a) by themselves, I cannot interpret them as affecting in any way the respondent's tenure of office as director. They are in common form, and are taken practically *verbatim* from the form which appears in PALMER'S COMPANY PRECEDENTS, 15th Edn., Vol. 1, p. 693, already referred to. I do not think that the effect of this common form of agreement is to deprive the company of its powers of terminating the managing director's tenure of the quite separate office of director, or the managing director's power as a director to resign that office, thus compelling the managing director to perform, and the company to allow him to perform, functions quite outside the scope of his employment as managing director. In effect, it would mean that the managing director agreed to serve the company, and the company agreed

to employ him, not only as managing director, an office with one set of functions (which is all that to which in terms the parties agree), but also as director, an office with a different set of functions (to which the parties do not in terms agree). If it is desired to produce such an effect, and if the articles of association allow it to be produced, words must be inserted sufficient for the purpose. The mere appointment to the office of managing director and the provision that the office shall be held for a term of years are not, in my opinion, sufficient. The "office" referred to in the agreement is the office of managing director, not that office coupled with the separate and distinct office of director. As I have already said, an agreement appointing a managing director for a term of years assumes that during the term he will continue to be a director. It ought not, in my opinion, to be interpreted as making provision, expressly or impliedly, to that effect.

Mr. Evershed's argument appears to me to be open to a further fatal objection. As a matter of construction, and apart from any question of *ultra vires*, I can see no middle course between holding that the agreement applies to all ways by which the tenure of the directorship may come to an end and holding that it does not apply to any. If the former were the correct interpretation, the agreement would amount to a guarantee that the respondent should remain a director during the whole term of 10 years. It clearly cannot have this effect, and Mr. Evershed did not suggest that it has. He said, however, that it does amount to a stipulation that the respondent should not cease to hold his directorship for any cause within the control of himself or the company—for example, resignation or removal. I can find no justification for taking this middle course. It would be equivalent to inserting a proviso to the effect that the respondent's tenure of his directorship was to be terminable by any means not within the control of himself or the company. I am of opinion, therefore, that these clauses cannot be construed either as a stipulation that the respondent shall hold the office of director during the term in any event or as a stipulation that he shall not cease to hold that office by any means within the control of himself or the company, and, in particular, by removal. These clauses have, in my opinion, nothing to do with the office of director as such.

It remains to consider whether or not the other clauses in the agreement justify a different construction. In my opinion, they do not. The restrictive clauses are taken practically *verbatim* from the form in PALMER'S COMPANY PRECEDENTS, 15th Edn., to which I have referred. Neither in that form nor in the present agreement do they affect the construction of the clauses relating to the managing directorship. The agreements with Sir Berkeley Sheffield do not carry the matter any further. None of these sets of clauses, in my opinion, entitles me to construe the provisions as to the managing directorship in the way suggested by Mr. Evershed, or to read into them (as the judge did) an implied undertaking by Southern that the power of removal from the office of

director shall not be exercised against him. It is no doubt true that the provisions contained in these clauses suggest that the parties expected a long life for the agreement, and it may be tempting to place upon it a construction which would give effect to this anticipation. This is a temptation to which I am not prepared to succumb.

The reasoning of the judge is different from that upon which Mr. Evershed relied. He said: "It is perfectly clear that it is an implied term of this agreement that Southern will not use whatever powers it may have to cause them to do something to the other party to the agreement which will prevent his being managing director." However legitimate such an implication may be in the case of an ordinary service agreement, there is, in my judgment, no justification for it in the case of an agreement appointing a managing director. The implication of terms in contracts is permissible only within the strictest limits. In the present case, it is, in my opinion, quite impossible to say that the parties must have intended what the judge suggests. The dependence of the tenure of office of a managing director upon his continuance in office as a director is so familiar, and the cases where, for intelligible business reasons, managing directors remain liable to powers of dismissal from their directorships are so commonly met with in practice, that no inference ought to be drawn as to the manner in which the parties to any particular agreement would have regarded the matter. The present agreement may have turned out to be a foolish one in that it made no provision for security of tenure such as the respondent seeks to discover in it. On the other hand, the parties may have been satisfied with the reasonable business expectation that neither party to the agreement would wish to bring it to a premature end, the company by dismissing the respondent from his directorship, or the respondent by resigning it. For all we can tell, the question of security of tenure in the office of director was fully discussed without any agreement being reached upon it. On the other hand, the parties may have deliberately abstained from raising what might have turned out to be a controversial subject. None of these possibilities can be excluded.

I do not forget the familiar principle laid down by COCKBURN, C.J., in *Stirling v. Mailland* (1), at p. 852:

... if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

This is no rigid rule, but, like all rules relating to the construction of written instruments, its application must depend upon the true interpretation of the instrument taken as a whole, when considered in the light of its own particular subject-matter. As I have said, I do not think that in this particular agreement such an implication ought to be made when its effect would be to create obligations to serve, and accept service, in an employment different and distinct from that with which the agreement

expressly deals. For these reasons, I would allow the appeal. However, as my brethren take a different view on this point, I must express my opinion upon the two remaining matters in the case.

I am unable to accept Mr. Radcliffe's second argument upon the question of liability. If, as I here assume to be the case, I am wrong upon the first argument, and there is to be found in the agreement an undertaking by Southern not by its own act to bring about the termination of the respondent's tenure of office as director, it appears to me that this undertaking was broken when Federated, armed with a power placed in its hands by the act of Southern in altering its articles, removed the respondent from that office. The act of Southern was an indispensable step in the process of removal.

The remaining matter relates to damages. The criticisms directed to the manner in which HUMPHREYS, J., arrived at the figure which he awarded are of a quite minor character, and I do not propose to discuss them in detail. It is sufficient to say that there is not in any of them any such substance as would justify us in interfering with the judgment in this respect. Having regard to the view taken by the majority of the court, the appeal must be dismissed with costs.

MACKINNON, L.J.: I think that this appeal fails. The question involved is the construction of the contract of Dec. 21, 1933, and whether the termination of Mr. Shirlaw's position as a director of Southern Foundries (1926), Ltd., constituted a breach of that contract.

If the articles of association as they existed on Dec. 21, 1933, had remained unaltered on Mar. 27, 1937, and the company had purported under art. 105 to remove Mr. Shirlaw from his position as a director by extraordinary resolution, they would clearly have committed a breach of the contract of Dec. 21, 1933. Indeed, I am not sure that such action under art. 105 would not have been *ultra vires*, for art. 91, which provides that a managing director shall be subject to the same provisions as to removal and resignation as those to which the other directors are subject, stipulates that this shall be "subject to the provisions of any contract between him and the company." As the contract of Dec. 21, 1933, expressly provided that he should be and remain managing director for 10 years, I think that this suspended or removed during that time any power of the company to remove him from being a director under art. 105, and, equally, his right to resign under art. 89. If, therefore, these articles had remained in force in Mar., 1937, there would have been a breach of the express terms of the contract, and there would have been no necessity to consider any implied term in it. In fact, however, by special resolution of Apr. 17, 1936, Southern adopted an entirely new set of articles. By No. 8 of these, Federated Foundries, Ltd., were given power to remove from office any director of Southern. Then No. 68 of the Table A provisions annexed, providing for the appointment of a managing director, made such appointment "subject to determination

if he ceases from any cause to be a director," and made no reference to the qualification "subject to the provisions of any contract between him and the company" that had existed in the old art. 91.

On Mar. 25, 1937, pursuant to the new art. 8, Federated exercised their power to remove Mr. Shirlaw from being a director of Southern. Upon receipt of this mandate on Mar. 27, he ceased to be a director, A and *ipso facto*, under No. 68 of Table A, his appointment as managing director was terminated. The question is whether this termination was a breach by Southern of the agreement of Dec. 21, 1933, caused or procured by Federated. I think that Humphreys, J., was right in holding that it was, for, as, by the contract and the then-existing B articles, the company had no right to remove Mr. Shirlaw from the office of director during the 10 years, I think it was an implied term that they would not by any alteration of the articles create such a right and exercise it during that period.

I recognise that the right or duty of a court to find the existence of C an implied term or implied terms in a written contract is a matter to be exercised with care, and a court is too often invited to do so upon vague and uncertain grounds. Too often, also, such an invitation is backed by the citation of a sentence or two from the judgment of BOWEN, L.J., in *The Moorcock* (2). They are sentences from an *extempore* D judgment as sound and sensible as are all the utterances of that great judge, but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathise with the occasional impatience of his successors E when *The Moorcock* (2) is so often flashed before them in that guise. For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said :

Prima facie that which in any contract is left to be implied and need not be F expressed is something so obvious that it goes without saying.

Thus, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: "Oh, of course." At least it is true, I think, that, if a term were never implied by a judge G unless it could pass that test, he could not be held to be wrong. Applying that in this case, I ask myself what would have happened if, when this contract had been drafted and was awaiting signature, a third party, reading the draft, had said: "Would it not be well to put in provisions that the company shall not exercise or create any right to remove Mr. H Shirlaw from his directorship and that he shall have no right to resign his directorship?" I am satisfied that they would both have assented to this as implied already, and would have agreed to its expression for greater certainty. Mr. Shirlaw would certainly have said: "Of course, that is implied. If I am to be bound by this agreement, including the

barring of my activities under cll. 11 and 12 when I cease to be managing director, obviously the company must not have or create the power to remove me at any moment from the board, and so disqualify me from that post." Then the company, which must be presumed to have been then desirous of binding him to serve it as managing director for 10 years, would, I think, with equal alacrity have said: "Of course, that is implied. If you were tempted by some offer elsewhere, it would be monstrous for you to be able to resign your directorship and, by so disqualifying yourself from being managing director, put an end to this agreement." In the result, I think that the judge came to a right decision, and this appeal fails. On the question of the amount of damages, I have nothing to add.

GODDARD, L.J.: I agree with MACKINNON, L.J., that this appeal should be dismissed. I deal first with what the position would have been had the articles of association remained as they were at the time the contract was entered into. By art. 90, the directors had power to appoint one of their body to be managing director for such period and upon such terms as they thought fit. It is conceded, as it must be, that, if the person so appointed ceased to be a director, his appointment as managing director would lapse. Thus, by art. 91 it is provided that the managing director shall not have to retire in rotation. It is provided also that he is to be subject to the same provisions as to resignation and retirement as those to which the other directors are subject, but that this is to be subject to the provisions of any contract between him and the company. The contract itself admits of no doubt as to its meaning and effect. The company agreed to employ the plaintiff, and he agrees to serve it, as managing director for 10 years. Therefore, he cannot resign during that period, so as to deprive them of his services, and nor can they remove him under art. 105, because by so doing they would by their own act defeat the provisions of the contract which they have made, and which they had power to make, to employ him for 10 years.

No question arises in this case as to the provisions of art. 89, but wholly different considerations would apply were that article in question. Were the plaintiff, for instance, to purport to give notice of resignation and then refuse to act as a director, or if he parted with his qualification, it might well be that he would vacate his office, but he would be liable to the company in damages for having, by so doing, broken the contract whereby he agreed to serve as managing director. In my opinion, it is clear that, under the original articles, the company had no power to remove the plaintiff under art. 105, having regard to the provisions of the agreement.

It is said that Southern never did remove the plaintiff from his office. What happened was that in Apr., 1936, the company amended—or, rather, entirely altered—its articles. The new articles gave power to Federated Foundries, Ltd., the second defendants, to remove any

director of Southern, and also provided that an appointment as managing director should determine if he ceased from any cause to be a director. It was in fact Federated who purported to remove the plaintiff from office. Granted that a company cannot be deprived of its right to alter its articles, it seems to me to be wrong to say that by an alteration the company can put it into the power of someone else to do in relation to an existing contract that which it could not do itself. If it is said that it is impossible for them to continue the employment of the plaintiff, one answer seems to me to be that the impossibility is of their own creation. Further, I think that it must be an implied term of the contract that the company would not so alter its articles as to put it in the power of itself or of anyone else to determine the contract. When one considers that, not only was the plaintiff bound to serve the company for 10 years, but also he was put under restrictive covenants of some severity, to take effect at the termination of the contract, it seems to me against all reason to say that the parties could have intended anything except that nothing should be done by them during the currency of the agreement which would prevent or disable the plaintiff from serving out his time. In my opinion, HUMPHREYS, J., was justified in making the implication that he did. As to damages, I see no reason whatever for holding that they are in any respect excessive, so that this ground of appeal also fails.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Allen & Overy* (for the appellants); *Slaughter & May* (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

B. G. UTTING & CO., LTD. v. HUGHES.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), **March 3, 6, 7, 16, 1939.**]

Income Tax—Profits—Speculative builder—Lease of house for premium and ground rent—Value of ground rent as trading profit—Case under which assessment to be made.

The appellant company carried on the business of speculative builders, building houses upon land owned by them, and, upon the completion of the building, disposing of some of the houses by granting a 99-years' lease in consideration of a premium paid in cash and the reservation of a ground rent. The questions were (i) at what value the ground rent should be brought into the trading account, and (ii) whether the premium should be assessed under Sched. D, Case I, or under Sched. D, Case III :—

HELD: (i) the ground rent ought to be brought into the trading account at cost or at market value, whichever was the less.

(ii) the premium was chargeable under Sched. D, and the Inland Revenue were entitled to choose under which case in Sched. D it should be charged. It would therefore be charged under Case I.

Decision of MACNAGHTEN, J. ([1938] 4 All E.R. 411) varied.

[EDITORIAL NOTE.] The Court of Appeal have distinguished this case from that of *Emery (John) & Sons v. Inland Revenue Comrs.* (1) in that in that case the land had been completely parted with and a rentcharge taken in its place. In the present case, the owner of the land had retained the fee simple, and all he had done was to demise the land for a long term in consideration of a small rent and a premium. The effect of such a transaction is rather to place an encumbrance upon the ownership of the land than to part with any interest therein, since, after the determination of the lease, the successors in title of the present owners will again be seised of the land in fee simple. The consideration of this question of ownership is important in order to determine whether the ground rent shall be brought in at its realisable value, or at cost or market value whichever is the less.

AS TO INCOME TAX ON SALE OF PROPERTIES BY BUILDERS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 100, 101, para. 194; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 122c-122f.]

Cases referred to:

- (1) *Emery (John) & Sons v. Inland Revenue Comrs.*, [1937] A.C. 91; Digest Supp.; 156 L.T. 87.
- (2) *Fry v. Salisbury House Estate, Ltd.*; *Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.*, [1930] 1 K.B. 304.
- (3) *Collier (H.) & Sons, Ltd. v. Inland Revenue Comrs.*, [1933] 1 K.B. 488; Digest Supp.; 103 L.J.K.B. 33; 148 L.T. 199; 18 Tax Cas. 83.
- (4) *Whelan v. Alfred Leney & Co., Ltd.*, *Loughnan v. Marston's Dolphin Brewery, Ltd.*, [1936] A.C. 393; [1936] 1 All E.R. 468; Digest Supp.; 105 L.J.K.B. 197; 154 L.T. 537; 20 Tax Cas. 321.
- (5) *Davies v. Abbott* (1927), 11 Tax Cas. 575; Digest Supp.
- (6) *Birch v. Delaney*, [1936] I.R. 517; Digest Supp.
- (7) *Surveyor of Taxes v. Northern Investment Co. of New Zealand, Ltd.* (1887), 14 R. (Ct. of Sess.) 734; 28 Digest 40, case f; 2 Tax Cas. 165.
- (8) *Liverpool & London & Globe Insurance Co. v. Bennett*, *Brice v. Northern Assurance Co.*, *Brice v. Ocean Accident & Guarantee Corpn.*, [1912] 2 K.B. 41; 28 Digest 60, 305; 81 L.J.K.B. 639; 106 L.T. 323; 6 Tax Cas. 327; *affd.*, [1913] A.C. 610.
- (9) *Californian Copper Syndicate, Ltd. v. Harris (Surveyor of Taxes)* (1905), 5 Tax Cas. 159; 28 Digest 23, case b.
- (10) *King v. Cadogan (Earl)*, [1915] 3 K.B. 485.
- (11) *Re Medows, Norie v. Bennett*, [1898] 1 Ch. 300; 13 Digest 55, 657; 67 L.J.Ch. 145; 78 L.T. 13.

APPEAL by Utting and Co., Ltd., from a judgment of MACNAGHTEN, J., dated Nov. 8, 1938, and reported [1938] 4 All E.R. 411, where the facts are fully set out.

A. M. Latter, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondent.

Latter, K.C., referred to *Fry v. Salisbury House Estate, Ltd.* (2), *Collier (H.) & Sons, Ltd. v. Inland Revenue Comrs.* (3), *Whelan v. Alfred Leney & Co., Ltd.* (4), *Davies v. Abbott* (5) and *Birch v. Delaney* (6).

The Attorney-General referred to *Surveyor of Taxes v. Northern Investment Co. of New Zealand, Ltd.* (7), *Liverpool & London & Globe Insurance Co. v. Bennett* (8), *Californian Copper Syndicate, Ltd. v. Harris (Surveyor of Taxes)* (9) and *Emery (John) & Sons v. Inland Revenue Comrs.* (1).

Hills referred to *King v. Cadogan (Earl)* (10) and *Re Medows, Norie v. Bennett* (11).

CLAUSON, L.J. [delivering the judgment of the court]: This case raises two points, both of importance to those concerned in the developing of building estates. The particular facts are set out fully in the stated case, and also in the judgment of MACNAGHTEN, J., under appeal, and need not be recapitulated. A

The first point arises thus. During the period of assessment, the taxpayer has expended money in purchasing freehold land, buying building material, paying for cartage, and paying wages. By means of this expenditure he has completed some houses and has partially completed others. Some houses he has sold out and out, receiving cash. Some houses are still unsold. Some houses he has demised on 99-years leases, receiving in each case a premium, and retaining unsold the freehold reversion, burdened, of course, by the 99-years' lease. In making out a trading account to lead to the ascertainment of the profit for the period of assessment, he debits the account with the whole of the above expenditure, which has resulted in the production of (a) the completed houses which he has sold out and out, (b) the completed houses which he has leased, reserving the freehold reversion, and (c) the uncompleted houses and the houses which have been neither sold nor let. He credits the account with the sale moneys received for the houses sold out and out, and with the premiums received on the grant of the leases on the houses demised on 99-years leases. In order to ascertain the profit during the period of assessment, he must credit the account with an item to represent the assets completed, or partially completed, but unsold. The normal method of dealing with this item would be to make it up by calculating the cost or the market value, whichever is the lower, of the various assets represented. The one thing which it would obviously be wrong to do would be to make up the item by putting on the assets the market value, if it exceeds cost. That would result in swelling the gross profit (the balancing item on the other side) by bringing in as part of the gross profit an unrealised profit. That is to say, it would put into the profit of the period of assessment the profit expected to be realised in the future. E F G

The claim of the Crown is that the freehold reversions should be brought into the account, not at their cost or their market value, whichever is lower, but at their market value, which can, it is said, be easily ascertained. The claim is supported on the ground that the freehold reversions of the leased plots ought not to be treated as unrealised assets of the business. It is said, and quite truly, that an asset may be realised either by sale for cash or by sale or exchange for something other than cash. It is pointed out that the House of Lords held in *Emery (John) & Sons v. Inland Revenue Comrs.* (1) that the sale of a completed house with the ground on which it stood for a rentcharge (or the Scottish equivalent H

of a rentcharge) charged on the land sold was a realisation of the house and ground, though not a realisation for cash, with the result that in the trading account of the firm then in question the rentcharge was to be brought in at market value (which, it was said, was easily ascertainable) as the proceeds of a realisation of the house and ground in question.

The answer of the subject to this claim is that, in the present case, the house and the ground on which it stands have not been realised. What has been realised (it is said) is a portion of the unincumbered freehold—namely, a term of 99 years at a ground rent, carved out of the freehold estate. The proceeds of that partial realisation—namely, the premium—have been brought in as proceeds of realisation, and appear (not perhaps quite accurately) in the item in the trading account representing proceeds of sale. What is called the “ground rent”—that is, the freehold interest burdened by the 99-years lease—is, it is said, an unrealised asset, and properly to be brought into the account at cost or at market value, whichever is the less. When it is sold in due course, the profit on the complete realisation of the plot will be ascertained, and that profit, so far as not already accounted for in this year’s trading account, will come into the trading account of the period covering the date of realisation. In our judgment, the contention put forward by the subject is correct. In truth and in fact, the freehold plot has not been realised. It has been retained unsold, subject, of course, to the alienation of the 99-years term. There is the crucial difference from *Emery’s* case (1) that in that case the subject had ceased to be the owner of the house and ground and had become the owner of a rentcharge. In the present case, the subject continues owner of the house and ground, though a partial interest in the house has been realised, and his ownership is, therefore, subject to the lease created by way of alienation, and realisation, of the partial interest.

It was suggested that in truth and in fact the business of the company, as regards these plots which it ultimately determined to lease on 99-years leases, was not the business of developing land and selling the developed land at a profit, but that of developing and leasing it and retaining as an investment the freehold reversion resulting from the leasing, and carrying on therewith the business of a mere investment or landowning company. It was pointed out, however, that the case contained no finding on which such a contention could be based. It is to be observed, further, that in this particular case the business is clearly not confined to that of developing by leasing, or, as it has sometimes been called, by “creating ground rents,” a circumstance which of itself may be enough to account for the absence of the finding required to give even a preliminary basis for the suggested argument.

The second point which arises is quite separate and distinct. The premiums which, as already explained, have been received, in the period of assessment, on the grant of 99-years leases have in fact been brought by the subject into the trading account as proceeds of sale. However,

it is suggested on behalf of the subject that, although these premiums are obviously profits arising from the subject's trade of land development, they are not properly taxable as such. The steps in the argument put forward in support of this contention, which, notwithstanding that the point must have been available in the case of a vast number of similar assessments, appears admittedly to be novel, are as follow. **A** First, it is pointed out that, under Sched. A, No. II, r. 6, the receiver of a fine in consideration of a demise of lands is to be assessed and charged to tax on the amount of the profits received in respect of the fine in the year preceding the year of assessment, with a proviso for allowance in the case of the profits being applied as productive capital. **B** Next, it is pointed out that it is impossible to draw any distinction between the word "fine" and the word "premium," for the present purpose. Each is nothing more nor less than a money payment in consideration of a demise. Next, it is pointed out that it is settled by the decision in *Fry v. Salisbury House Estate, Ltd.* (2), that, if an item **C** of receipt is taxable under Sched. A, it cannot form an item in the computation of liability to tax under Sched. D. The conclusion suggested is that, had the present case arisen before certain changes were effected in the law by the Finance Act, 1926, the operation of which will be dealt with later, it would have been necessary to hold that the premiums **D** in question were taxable under Sched. A, with the result that they would have to be eliminated from the trading account as adopted for the purposes of taxation under Sched. D.

The provision in Sched. A, No. II, r. 6, is to be traced back to legislation as early as 1805, and it was argued for the Crown that the purview of **E** the rule is very narrow, and must be limited to fines on renewal of renewable leases, whether renewable under covenant or by custom. It may very likely be the case that fines of this character were very familiar in 1805, and that at that date such premiums as the present were unknown, or at least unusual. It does seem to be the fact that it has never **F** been the practice to construe the word "fine" in the rule as covering such premiums as the present. However, the fact remains that in its language the rule is not confined to a demise by way of renewal of a former lease, and no sound ground seems to exist for distinguishing between a fine on a demise and a premium on a demise. It would be **G** attractive in such a case, but scarcely legitimate, to fall back upon the maxim *communis error facit legem*. For reasons which will appear below, it is not necessary to form a final view upon the question, and the case may safely be dealt with on the assumption, without deciding the point, that the subject's contentions are so far correct, and that, apart **H** from the effect of the Finance Act, 1926, the subject's claim to eliminate these premiums from the Sched. D account, on the footing that they are taxable under Sched. A, is a sound claim.

A drastic change was made, however, by the Finance Act, 1926, s. 28. By that section, read with Sched. III of that Act, the subject-matter

of the Income Tax Act, 1918, Sched. A, No. II, including fines (the subject-matter of No. II, r. 6), ceased to be chargeable under Sched. A, and became chargeable under Sched. D, Case III, the proviso to r. 6 being incorporated among the rules of Sched. D, Case III. The result,

- A** no longer operates to exclude the premiums from assessment under Sched. D. The question still remains, however, whether the express provisions of the Finance Act, 1926, s. 38, coupled with Sched. III of that Act, make it essential that the premiums should be dealt with under Sched. D, Case III, and under no other case. If they are to be
- B** dealt with under Case III, the subject will have the benefit of the proviso in r. 6 making an allowance to him in case the premiums are applied as productive capital. It is suggested, however, for the Crown, that the effect of the 1926 Act and its schedule is merely to expand Sched. D, Case III, so as to cover this special subject of taxation, and that there
- C** is nothing expressed in, or to be implied from the wording of, the 1926 legislation which repeals, in regard to those particular items, the well-recognised right of the Crown, where a subject-matter of taxation under Sched. D falls within more than one case, to choose the case under which it is to be assessed, and thus to choose the case rules applicable.
- D** It is plain that the profits from the premiums fall within Sched. D, Case I, as profits from a trade, and that, until the 1926 Act, it was only the assumed operation of Sched. A, No. II, r. 6, which taxed them under Sched. A, and thus (on the principle of the *Salisbury House* case (2)) excluded them from taxation under Sched. D. The transfer from
- E** Sched. A to Sched. D effected by the 1926 legislation leaves them taxable under Sched. D, Case I, though at the same time, by virtue of the 1926 legislation, they are taxable under Sched. D, Case III. When once the conclusion is reached (and, in our view, it is a correct conclusion) that nothing in the 1926 legislation places the profits in question in any
- F** position different from that of any other item taxable under Sched. D, Case III, it seems necessarily to follow that the Crown can exercise its option to tax them under Case I, with the result that the proviso to Sched. A, No. II, r. 6, though now operating as a rule under Case III, ceases to have application to them. The result is that, assuming the
- G** premiums in question to be "fines" within the meaning of Sched. A, No. II, r. 6, since they are, in this particular case, profits of a trade, they are properly brought into the trading account as proceeds of realisation, and are thus taxable under Sched. D, Case I.

- H** It was common ground between counsel that, if the freehold reversions (otherwise referred to as the ground rents) are not to be brought in at their realisable value, the matter must be remitted to the commissioners to determine the basis on which cost price should be calculated. Accordingly, the appeal will be allowed, and the case will be remitted to the commissioners. The determination of the commissioners that the premiums are to be reckoned under the heading of receipts from sales

is correct, and will, of course, remain unaffected. As the Crown has succeeded in regard to the premiums, while the subject has succeeded as regards the matter of the freehold reversions or ground rents, there will be no costs on either side of this appeal, or of the hearing before the judge. There will be leave to either side to appeal to the House of Lords.

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors: *Royds, Rawstorne & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

SELWOOD v. TOWNELEY COAL AND FIRECLAY CO., LTD.

[MANCHESTER WINTER ASSIZES (Croom-Johnson, J.), **February 28, March 20, 1939.**]

Workmen's Compensation—Alternative remedies—Election between two remedies—Receipt of compensation—Knowledge of workman—Workmen's Compensation Act, 1925 (c. 84), s. 29.

The plaintiff, a surface hand employed by the defendants, met with an accident, in consequence of which he was removed to hospital, where he remained for some months. While he was there, the defendants each week sent him money, which he received knowing that they had sent it as representing half his wages and as compensation under the Workmen's Compensation Act. After having received these weekly payments for some time, and, while still gravely incapacitated, he, acting under legal advice, informed the defendants that he did not wish to receive any further compensation, and shortly afterwards he made a claim at common law against them for damages for negligence causing the injuries which he had suffered and for breach of statutory duty. There was no evidence that the plaintiff at any time made a claim to receive compensation, neither was there any evidence that he knew what had caused his injuries or any of the facts which were subsequently investigated, beyond the fact that he was crushed by a tub :—

HELL : (i) on the facts of this case, the plaintiff had not applied his mind to the question of election one way or the other, and there was sufficient evidence to rebut the presumption of an equivocal act amounting to an election.

(ii) the provision in the Workmen's Compensation Act, 1925, s. 29 (1), that the employers shall not be liable to pay compensation both under and independently of the Act does not provide a separate obstacle against recovery by the workman. The whole of the section must be read together and it all relates to the one question of election.

[EDITORIAL NOTE.] The question here is what amounts to an election to take compensation rather than to pursue the remedies at common law. The authorities in which there has been a receipt by the workman of sums which are the same in amount as the compensation do not definitely decide that the receipt of such a sum is a definite election not to pursue the remedies at common law. The question of election is here held to be one of intention, and all the facts of the case must be considered.

AS TO ALTERNATIVE REMEDIES, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 195, 196, paras. 430, 431; and FOR CASES, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071. See also WILLIS'S WORKMEN'S COMPENSATION 31st Edn., pp. 478-483.]

Cases referred to :

- (1) *Edwards v. Godfrey*, [1899] 2 Q.B. 333 ; 34 Digest 492, 4072 ; 68 L.J.Q.B. 666 ; 80 L.T. 672 ; 1 W.C.C. 32.
- (2) *Cribb v. Kynoch, Ltd.* (No. 2), [1908] 2 K.B. 551 ; 34 Digest 492, 4071 ; 77 L.J.K.B. 1001 ; 99 L.T. 216 ; 1 B.W.C.C. 43.
- (3) *Bennett v. Whitehead (L. & W.), Ltd.*, [1926] 2 K.B. 380 ; 34 Digest 492, 4068 ; 135 L.T. 329 ; 19 B.W.C.C. 133.
- (4) *Kendall v. Hamilton* (1879), 4 App. Cas. 504 ; 21 Digest 218, 540 ; 48 L.J.Q.B. 705 ; 41 L.T. 418.
- (5) *Beckley v. Scott & Co.*, [1902] 2 I.R. 504 ; 34 Digest 492, case *q*.
- (6) *Harrison v. Wythemoor Colliery Co.*, [1922] 2 K.B. 674 ; 34 Digest 493, 4076 ; 91 L.J.K.B. 832 ; 127 L.T. 629 ; 15 B.W.C.C. 98.
- (7) *Main Colliery Co. v. Davies*, [1900] A.C. 358 ; 34 Digest 246, 2115 ; 69 L.J.Q.B. 755 ; 83 L.T. 83 ; 2 W.C.C. 108 ; *affg.* S.C. *sub nom.* *Davies v. Main Colliery Co., Ltd.* (1899), 80 L.T. 674.
- (8) *Campbell v. Caledonian Ry. Co.*, [1899] 1 F. (Ct. of Sess.) 887.
- (9) *Little v. MacLellan* (1900), 2 F. (Ct. of Sess.) 387 ; 34 Digest 491, case *h*.
- (10) *Codling v. Mowlem (J.) & Co., Ltd.*, [1914] 3 K.B. 1055 ; 34 Digest 491, 4067 ; 83 L.J.K.B. 1727 ; 111 L.T. 1086 ; 7 B.W.C.C. 786.

ACTION for damages for personal injuries incurred by the plaintiff in an accident on Feb. 9, 1938, when he was working on a railway elevator track at a colliery. The jury awarded the sum of £3,086 5s. 6d. damages. The judge then heard counsel on the law as to election on the part of a plaintiff between his remedy at common law and that under the Workmen's Compensation Acts. The facts and the arguments are fully set out in the judgment.

William Gorman, K.C., Hartley Shawcross, K.C., and J. S. R. Abdela for the plaintiff.

F. A. Sellers, K.C., and A. Denis Gerrard for the defendants.

CROOM-JOHNSON, J. : Harold Selwood was employed as a surface hand by the defendants, the Towneley Coal and Fireclay Co., Ltd., for a period of some 12 years prior to Feb. 9, 1938. On that day, whilst working at the bottom of a railway elevator track known as a jinny, he met with an accident in the course of, and arising out of, his employment. The accident caused very severe injuries. The plaintiff was crushed by a loaded tub of coal which had come down the jinny unattended, and the result was that the lower part of his body was very severely crushed. There were comminuted fractures of both bones of the right leg, a compound fracture of both bones of the left leg, and a fracture of the right femur, the top of the trochanter being broken off from the shaft, and there is no doubt at all that the injuries were of the gravest possible character. The man was removed to hospital, and there he remained for some months in circumstances which have not been very clearly explained. Whilst he was in hospital, somebody on behalf of his employers, the defendants, sent to him each week money which he apparently received in the hospital and handed over to his wife. This money he received well knowing and understanding that it was sent to him by his employers as representing half his wages, based on the

average of the 12 months preceding the accident, and that the money was sent to him as compensation under the Workmen's Compensation Act. At some time in or about July, 1938, somewhere after July 22, when the plaintiff was still gravely incapacitated, he stopped taking these weekly payments and sent his wife to the colliery to say that he did not want any more compensation. That was because his solicitor A told him to do so, or as he puts it :

Our solicitor informed us that we were to cease drawing this money. Shortly after that time, a claim was put forward against the defendants on behalf of the plaintiff for damages, on the basis that the injury from which the plaintiff suffered was caused by the personal negligence or B wilful act of the defendants, or of some person for whose acts or default the employers were responsible, and on Aug. 10, 1938, the writ in this action was issued. In the statement of claim in the action, various acts of C personal negligence and breach of statutory duty were alleged against the defendants, but in the end the matter appeared to resolve itself into complaints that no means of checking or stopping runaway tubs existed on this jinny, to which I have already referred ; that tubs running away were liable to endanger persons working upon the lower platform ; that the defendants failed to maintain the plant in a safe and efficient state ; D that they failed to have any, or any sufficient, safe or proper system for warning persons working upon the lower platform of runaway tubs, and, perhaps most important of all, that they failed to take any steps to protect persons working on the lower platform from the danger of runaway tubs, or to provide any system for protecting them from such E danger.

So far as was material for the trial of the present action, the defendants' defence consisted of a denial of any negligence. Indeed, they set up an affirmative case that the accident in question was due to the negligence of a fellow-workman in the employ of the defendants, so that, if that were found as against the plaintiff, they might avail themselves of the doctrine of F common employment, and, further, that the accident was caused by the wilful act of a fellow-servant, the suggestion being that, in the exigencies of his work, the fellow-servant had lost his temper and sent a full tub down the side, where, normally, empty tubs should go. There was evidence to show that, after the date of this accident, the defendants G had installed at this place a device to enable runaway tubs, whether full or empty, to be stopped. There was further evidence that, up to that time, there was nothing at the bottom to stop a runaway tub before it reached the bottom, and there was further evidence which the jury were entitled to accept, and which, if I had been sitting alone, I H think I should have accepted myself, that tubs running down the side where empty tubs should go were frequently known to run away, and had been known frequently to run away during most of the time that the plaintiff was employed at this particular place, the lower platform. There was further evidence that full tubs had been known to run away,

and there was evidence that, although the plaintiff was the first to meet with such an accident, and to be injured by runaway tubs, the plaintiff had seen some very narrow escapes. The evidence was not very plain as to precisely how many full tubs had run away, but I am not sure that, once it is established that tubs, whether full or empty, run away down

A this jinny, as the plaintiff said, at least once a day, it matters very much whether the particular tub happens to be full or empty. It seems to me to be only a question of degree, a full tub being more likely to cause grievous injuries than an empty tub would be. The other piece of evidence to which I think it necessary to refer at the moment is that

B the defendants, by their witnesses, made valiant efforts to satisfy the jury that, although they had put in a device for shutting the stable door after the horse had gone, it really was quite useless, and that they had never tried it, and never put it into use or made any experiment with it. On that particular point, there was evidence by Mr. Gunston,

C an expert witness called on behalf of the defendants, that this device, called a Drop Warwick, was only used in other collieries on haulage systems longer than this particular system, and, as I gathered, it was there efficacious for the purpose. At the conclusion of the case for the plaintiff, Mr. Sellers, on behalf of the defendants, submitted that there

D was no evidence of negligence fit to go to the jury, and he further submitted that, having regard to the Workmen's Compensation Act, 1925, s. 29, the action was not maintainable. I decided that it would be better if the case were to be fought to a conclusion. I submitted certain questions to the jury for them to answer. I gave leave to Mr. Sellers,

E after those questions had been answered, to move for judgment on behalf of the defendants, and it was agreed, either then or at a later stage, that, when the questions had been answered and I had heard argument, I should find any further facts that it might be necessary to find, and draw any necessary inferences, in order that the point of law might be

F properly determined. I ought perhaps to add to what I have said that there was no evidence that the plaintiff at any time—before, after or during the receipt by him of the payments of workmen's compensation which were made to him by the defendants—ever made a claim to receive compensation. There was no evidence that the plaintiff knew,

G at or after the time of the accident, what it was that had caused his injuries, beyond the fact that he was crushed by a tub. There was no evidence that he knew any of the facts and circumstances which were ultimately investigated, and there was very clear evidence—which was ultimately accepted by Mr. Sellers, on behalf of the defendants, as

H being the truth, there being no evidence to the contrary—that the plaintiff did not know that drawing compensation would affect his getting damages, that he did not know that he had a claim for damages, and that he never thought about it. He was in hospital for a month and three days the first time, with both legs in plaster. I think that he went back on May 16. He had been in bed during the time he had

been at home, and the subsequent story is that, after several operative efforts, somewhere about June or July he was at home and confined to bed, until he began to sit up somewhere round about July 22, 1938. In those circumstances, I put the following questions to the jury:

Did the defendants use reasonable care to see that the jinny was reasonably safe for persons working on the lower landing?—No.

If nay, in what respect was the jinny not so reasonably safe?—In the matter of safety devices and lack of management supervision.

Did the want of reasonable care cause the plaintiff's injuries, or were they caused by the negligence of the person operating or in charge of the jinny?—Yes, want of reasonable care.

Did the plaintiff elect to accept workmen's compensation to the exclusion of his claim at common law?—No.

There was a further question on the damages, but at the moment it is not necessary for me to refer to that. Upon those answers, Mr. Sellers, pursuant to the leave which I had given to him, moved to enter judgment for the defendants, and the first point that he took was that there was no evidence of negligence, no evidence entitling the jury to find that there was negligence, or, to use Mr. Sellers' final words, no evidence to go to the jury of any breach of duty by the defendants. I think that I can deal with that quite shortly. There was evidence, in addition to what I have said, that some person had reported some, at all events, of these accidents to the people who were in charge of this jinny at the top, and, from what I am able to gather, and from the inferences which I draw from the whole of the evidence, it seems to have been a matter of fairly common knowledge at this place that trucks did run away down the jinny. The defendants' evidence on the point was not that trucks never ran away, but that they ran away on very few occasions. If I am entitled to express an opinion myself, I say that, judging the evidence proffered by the defendants on that matter, I do not find it satisfactory, and the jury, I think, were entitled to find, and I think from the answers to the questions that they must have found, that the story told as to the number of trucks that ran away as offered on behalf of the plaintiff was the correct story.

As far as it is necessary that I should give any further findings of fact on the matter, I have not the least hesitation in saying that on this point I prefer the evidence of the plaintiff and his witnesses to that of the defendants' witnesses. Once one arrives at that stage, when it is proved to a jury that, after this accident happened, the safety device to which I have referred, called the Drop Warwick, was instantly put up, that a Drop Warwick is quite well known in this industry in this district, although in places where the jinny is rather longer than this particular jinny, and that nothing had been done during the years in which people had had narrow escapes from injury from runaway tubs, it seems to me that there is ample evidence upon which a jury could find that this accident was caused by want of reasonable care by the defendants, or by persons for whose act or default they were responsible. The evidence suggesting that this was due to the wilful act of a person employed

by the defendants in connection with the management of these trucks was introduced somewhat late in the case. To my mind, it was not satisfactory. I think that the jury, by their answer to question No. 3, have rejected it, and, in my judgment, they have rightly so rejected it.

- I pass on to Mr. Sellers' second point, which I think presents some
- A** difficulty, but not a great difficulty. Under the Workmen's Compensation Act, 1925, s. 29 (1), where there is a right to claim damages by reason of a civil liability on the employer for an injury alleged to be caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, the workman
- B** may, at his option, either claim compensation under the Act or take proceedings independently of the Act. That option is between bringing an action at common law and resorting to the procedure for the assessment of compensation as given by the Act itself: see A. L. SMITH, L.J., in *Edwards v. Godfrey* (1), at p. 337, approved
- C** by Sir H. H. COZENS-HARDY, M.R., in *Cribb v. Kynoch, Ltd.* (No. 2), (2), at p. 556. The question of the exercise of the option is one which has to be left to be dealt with by the general law of the land: see BANKES, L.J., in *Bennett v. Whitehead (L. & W.), Ltd.* (3), at p. 387. While the statute says nothing about how this option is to be exercised,
- D** it seems to me that it must be a case in which the workman must make his election. Whether or not a man elects is, I think, a question of fact, and, before a man can elect, it seems to me that he should have, first of all, knowledge that he has a right to elect: see *Kendall v. Hamilton* (4), at p. 542. This man has sworn that he did not know that he had any
- E** claim. He did not even know—at least, there is no proof that he knew—the facts which could give rise to the claim at the time these sums of money were being paid. He had put forward no claim. He has sworn that he never gave it a thought. One must picture the injured workman suddenly, after 12 years' employment, with his earnings stopped, finding
- F** himself in hospital, and finding money coming to him from his employers, money which he recognised, apparently, as being money which was paid to him as half-wages and by way of compensation under the Act of Parliament. It seems to me, in those circumstances, that to say that this man was making an election is to say something which is, indeed, very
- G** far from the fact. It may be that the particular facts of this case are of supreme importance on this particular branch of the case, and, accordingly, I desire to point out that nobody who saw the spectacle of the plaintiff standing on his crutches in the well of the court, giving his evidence manifestly with care, making admissions, when they had to be made,
- H** without any hesitation, and without any desire at all to limit them or cut them down, could fail to be satisfied of the plaintiff's complete honesty. It is not surprising that, when his evidence had been given on this highly important point, no evidence was called on the other side, and that, in the course of the discussion which subsequently arose, Mr. Sellers, in terms, on behalf of the defendants, and I think quite rightly,

accepted that that to which the plaintiff had sworn about these matters was true. Accordingly, one must deal with this workman, whatever may have been said in other cases as to what workmen are supposed to know about their rights when they meet with an accident at work, on the basis that he did not know that he had any claim, and that, as soon as it was pointed out to him that there was a possibility of a claim, under advice, he instantly stopped receiving the weekly payments which had been made to him. A

I desire to point out one other thing. The option, as has been pointed out—the election which the workman has to make—is between bringing an action at common law and resorting to the procedure for compensation given by the Act. The object is, as was pointed out by HOLMES, L.J., in a dissenting judgment in *Beckley v. Scott & Co.* (5), at p. 533, that the employer shall not be subjected to “the expense, trouble and inconvenience of two sets of proceedings,” an observation which seems to have been approved in *Cribb v. Kynoch, Ltd.* (No. 2) (2), to which I have already referred, and also in *Harrison v. Wythemoor Colliery Co.* (6). It seems to me that, on these facts, there was ample evidence on which the jury could come to the conclusion which they have come to in the fifth question, the effect of which is that the plaintiff did not elect to accept workmen’s compensation to the exclusion of his claim at common law. B I must remember, however, that the election is an election between making claims, and that the answer is an answer which deals with an election to accept compensation. Therefore, it is desirable to point out that, apparently, in a good many cases, the method of looking to see whether or not a man has made an election is to see whether or not he has done some unequivocal act at some stage rather than make a claim, so that the court can infer, and must infer, that he was electing to take his proceedings under the Act of Parliament. Perhaps the taking of proceedings is not exactly the right expression, because in *Main Colliery Co. v. Davies* (7), at p. 366, it was held that notice of a claim would be enough. C It seems to me, on these facts, that the man never applied his mind to the question of electing between one claim and another. He did not know his rights. He did not know the facts which could give rise to the present claim—at least, there is no evidence that he did—and, in view of the cross-examination directed to him, I think that the fact that there is no evidence is indicative that there can be none. D Therefore, it seems to me that, applying, as I must do, the general law dealing with election, this question cannot be answered, so far as I have gone, in favour of the defendants. E

On this branch of the case, Mr. Sellers takes a subsidiary point which has caused me a good deal of difficulty. He says that, once it is proved that the man has accepted workmen’s compensation knowing that it is workmen’s compensation, that is such an unequivocal act that it must amount in law to an election, although the cases all seem to recognise that an election is really a question of fact. As to that, the authorities F G H

- are not, to my mind, very satisfactory. Everybody appears to agree that unequivocal acts may be of such a nature that there is no longer any room for doubt, and that the workman is then in the position of being supposed to make an election. Except in one instance which occurs to me, I do not think there is any case in which there is a
- A** presumption which is irrebuttable. The one case, as it seems to me, is where the workman makes a claim, and takes proceedings, and succeeds in obtaining an order. I think that it would be extremely difficult if, in view of those facts, a workman were to be allowed to say: "I would like to explain the circumstances in which that
- B** was done." I think that, when it comes to a question of a man having received compensation, in the absence of any evidence to the contrary, that would be an unequivocal act, and would be one which would be deemed to be an election. However, if I am right in the view which I have formed—that evidence has been given to explain those
- C** circumstances and to rebut what would otherwise be the presumption—then, on the facts of this case, that evidence having been received and accepted by the defendants, it seems to me plain that the presumption is rebutted. I ought, perhaps, to refer to certain authorities which are collected in *WILLIS'S WORKMEN'S COMPENSATION*, 31st Edn., p. 483.
- D** Discussing questions as to when an action against an employer is barred, which is the problem I am discussing at the moment, the author says, at p. 483 :
- ... there will be a concluded election and subsequent action will be barred if the workman has claimed, or has by a valid and binding agreement agreed to accept, compensation under the Act, and has been paid compensation in respect thereof ...
- E** if he has acquiesced in the recording of a memorandum of agreement under the Act.
- Mr. Sellers argued that, once this compensation was received by the plaintiff, the employer would be entitled, as of right, to have the agreement registered under the Act, pursuant to sect. 23, and that, therefore, the workman has agreed to accept compensation under the Act, and has
- F** been paid compensation in respect thereof. He bases himself, as I understand, on the two cases cited in *WILLIS'S WORKMEN'S COMPENSATION*, 31st Edn., p. 483—namely, *Campbell v. Caledonian Ry. Co.* (8) and *Little v. MacLellan* (9). That seems to me to leave this position : has the workman agreed to accept compensation ? On the facts here, I am
- G** quite unable to find that this workman has agreed to accept compensation. He received money that was offered to him. He knew in what guise that money was offered, but there was a complete absence of that vital knowledge which would enable him, as it seems to me, to make an agreement binding on him in law. He never acquiesced in the recording
- H** of a memorandum of an agreement under the Act. Nobody ever thought of it, and there is a doubt left in my mind, on the evidence as a whole, as to whether or not the amount which was sent by the employers did in fact amount to half-wages on the man's average earnings for the previous 12 months. Accordingly, Mr. Sellers' second point, in my opinion, must also fail.

Mr. Sellers went so far as to say that the mere receipt of 5s. on account of the first week's compensation would be enough to bar this claim, but, indeed, by an odd result, the Workmen's Compensation Act, when originally introduced, was supposed, to confer benefits on the workman who otherwise had no benefits, and, if the workman uses the Workmen's Compensation Act, this particular section has the effect of destroying, and making no longer available to him, the common law remedy to which he was entitled, and to which he had been entitled for a great many years. A

I do not find it necessary to examine all the other cases which have been submitted to me, because I have to go on to look at yet a third point which Mr. Sellers argued before me. Mr. Sellers' third point is this. In a part of the section which, apart altogether from the authorities to which I have referred, I should have found a little difficult to understand, occur these words : B

... but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid. C

The words "and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid," seem to me to be little more than another way of putting the opening words of the same subsect. (1), but Mr. Sellers says that that other part of it : D

... but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act. . . . E

constitutes a wholly separate matter, separate and distinct from the question of election, and that, even in a case where the workman has not elected at all, and where, as here, the election point is found against the employer, once the employer has succeeded in persuading the workman to accept any payment whatsoever on account of even the first week's compensation under the Act, the workman is then barred from his remedy, because, once one gives the workman anything independently of the Act, the employer will have to pay twice over, and he says that that is forbidden by this sentence in the statute. Accordingly, where, as here, the jury have returned a verdict assessing the damages at no less a figure than £3,086 5s. 6d., if the employers send the man 2s. 6d. the first week in such circumstances that the man knows that it is being sent on account of workmen's compensation, and accepts it, even although the man knows none of the facts whatever about his accident, and is not in possession of those facts which would enable him to make election, and has not in fact elected, Mr. Sellers says that the result, under this part of the section, is that the remedy of the man is barred. I have not been able to find any authority which suggests that that is the law. It was certainly argued in one case, *Codling v. Mowlem (J.) & Co., Ltd.* (10). That was a case where the employer had paid into court in a death case the maxi- F G H

num amount payable under the Act—namely, £300—and it was argued that that barred a separate remedy by the widow of the workman, who at some later stage of the proceedings had apparently desired to stand aside from sharing in the maximum £300. The case ultimately went off on a question as to whether or not, on the facts of the particular case, the widow had plainly manifested an intention of relying upon the Act of Parliament, and not upon independent proceedings, but nowhere in that case do I find that it was argued, nor in any of the cases to which my attention has been called has it been argued, that the mere payment of however small a sum of money is sufficient, apart altogether from election, to bar the remedy of the workman at common law. It seems to me that this argument would have rendered unnecessary a good many of the arguments which were addressed to the courts in some of the cases as to the effect of the workman's knowledge, and of the acts which he had done. However, in a case in which the workman has shown, as I have decided—I think rightly—that he was not intending to give up his rights, it would certainly be a curious result if, while a sick man is in hospital, or at home, as this man was, in complete ignorance of his right to maintain an action at law, and, as I think, in complete ignorance of the facts which ultimately emerged in this case, he should be deprived of his remedy at common law.

I should have liked to have had an opportunity of looking longer at the cases which were cited to me, and of consulting many of the cases on this very difficult section. I have found it extremely difficult exactly to appreciate the effect of this paragraph with the rest of the section, and I confess that, after having looked at such few cases as were available to me, I did not find my task made any the easier. It looks to me as if Mr. Sellers is not right when he submits that these later words provide a separate remedy, or separate obstacle against the workman. It looks to me as if all the words of the section must be read together, and I think that the whole section relates to the one question of election. I am not sure that I quite understand the precise significance of the word “but” which introduces the phrase which has given rise to this argument. Perhaps it ought to be construed as “and,” and, if so, it looks to me as though it were merely explanatory of, and consequential upon, the opening words of the subsection dealing with the question of option or the question of election. Whichever way it is, I do not find any authority, and, indeed, Mr. Sellers cited none to me, which compels me to decide that the acceptance of these sums by way of compensation—in the present case amounting to £27 16s. 2d.—bars the workman's claim at common law. The result is that, in my opinion, these three points fail, and Mr. Sellers' motion, accordingly, must be rejected.

Judgment for the plaintiff for £3,086 5s. 6d., with costs.

Solicitors: *Oddie & Roebuck*, Blackburn (for the plaintiff); *Peace & Ellis*, Wigan (for the defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

DALY v. LIVERPOOL CORPORATION.

[LIVERPOOL HILARY ASSIZES (Stable, J.), **February 24, 1939.**]*Negligence—Vehicle on highway—Public vehicle—Duty to observe time schedule—Duty to avoid accident—Accident to elderly pedestrian.*

The plaintiff, a woman aged 69, while crossing the road, was injured by an omnibus driven by a servant of the defendant corporation. It was proved that the driver saw the plaintiff at a time when he could have avoided the accident, but did not know whether the plaintiff was young and active or rather elderly and slow :— A

HELD : as the driver could have avoided the accident, he was negligent, although so to find was to impose upon the driver a standard of care and skill which it was impossible to reconcile with the proper discharge of his duty as a driver of a public vehicle—namely, his duty to keep to a reasonable time schedule. B

[EDITORIAL NOTE.] The driver of a public vehicle has a duty to his employers, and also to the public, to proceed at such a pace that he can keep to a reasonable time schedule. In busy parts of large towns, if he were fully to observe the duty to exercise meticulous care to avoid accidents involving pedestrians crossing the streets, it is very doubtful whether he would be able to keep to such a time schedule. The judgment in the present case says that these two duties are irreconcilable. In these circumstances, it is found that, as the driver could have avoided the accident, he is liable in damages to the injured party, although the judge states that no sort of blame can be placed upon him. The judgment contains a careful consideration of the duty of such a driver in the case where the pedestrian is a lady of advanced years. C

AS TO VEHICLES ON HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 637-644, paras. 894-906; and FOR CASES, see DIGEST, Vol. 36, pp. 59-63, Nos. 366-405.] D

ACTION for damages for personal injuries received by the plaintiff in an accident alleged to have been due to the negligent driving of an omnibus by the servant or agent of the defendant corporation. The defendants by their defence denied that the driver was negligent, and alleged that the accident was caused or contributed to by the negligence of the plaintiff. The facts of the case are fully set out in the judgment. E

William Gorman, K.C., and B. R. Rice-Jones for the plaintiff. F

D. P. Maxwell Fyfe, K.C., and H. I. Nelson for the defendants.

Gorman, K.C. : The standard of care is obviously higher when infirm persons are concerned than it is where ordinary vigorous adults are concerned. Moreover, in a case where a younger person would be said to be negligent, the same action on the part of an aged person may not necessarily be negligent. G

Fyfe, K.C. : A driver cannot be expected to take into account unexpected idiosyncrasies. To do so is more than can be expected of the average reasonable man. Contributory negligence, on the other hand, is not a question of duty at all. Therefore, there can be no higher and lower standards. The question is who caused the accident. H

STABLE, J. : The plaintiff, a woman of 69 years of age, sues the Liverpool Corporation for damages for injuries she sustained by reason

- of the fact that she came into collision—to use a neutral phrase, though it was not a very neutral sort of collision—with one of the defendant corporation's buses on June 27, 1938. I think that it is only right and fair that, when I say that I have come to the conclusion that the corporation must pay damages for what took place, which is in effect to impose
- A on the driver of the bus the responsibility for this accident, I should say that in my judgment there was no sort of culpable negligence on the part of the driver. He seems to have had a clean record for 7 years, and it would be an act of injustice if his employment, his terms of service, his pay, his future prospects or his conduct sheet should be impaired by
- B the decision in this case. The fact of the matter is that drivers of public vehicles in any of our big cities are compelled by the very necessities of their employment to attempt to reconcile two things that are irreconcilable. They have to keep to a certain time schedule—otherwise the traffic would become completely stagnant—and it is impossible, in my
- C opinion, for any driver of such a public vehicle to discharge that part of his duties without from time to time taking chances, to use an expression which everybody understands. We have only to look any day, any night, in any street, in any town, and we see people surging round these moving vehicles. Of course a bus driver cannot keep his bus standing
- D still, for, if he did, he would probably keep it so for the better part of the day. He has to proceed. Most of the people who are moving round are active, vigilant and quick. Anyhow, they think that they are. Occasionally, one makes a mistake, or slips, or is slower or less active or less vigilant than the others, and then there is an accident. In such a case,
- E the bus driver or the driver of the vehicle is, in a sense, to blame, because he does not avoid an accident which, if he had driven more slowly, if he had appreciated, as every driver must appreciate, that there is an ever-present risk of an accident which he could avoid, would never have occurred. In those circumstances, it cannot be said that the driver is
- F not responsible for the accident.

The plaintiff in this case is an elderly woman. She was trying to cross the road, and I think that she was doing her best. For one of that age, I do not think that it was at all a bad best, but it was not good enough. Although her inability to see the bus and to think as quickly as younger

G people could have done, and to take the necessary action, would not occur in younger men and women, what she actually did was the best she could. I cannot believe that the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical pedestrian, he or she can only

H walk about his or her native country at his or her own risk. One must take people as one finds them. There is no hypothetical standard of care. We must all do our reasonable best when we are walking about.

So far as the driver of the bus was concerned, I think that he was a thoroughly competent bus driver, driving his best in a perfectly normal way. He saw the plaintiff at a time when he could have averted this

accident. Of course, he did not know whether the woman he saw was young and quick or rather elderly and slow. If the woman had been young, there would not have been an accident. If the woman had been elderly—as in fact she was—there was a very grave chance of an accident.

In all these cases, this is the task which bus drivers must necessarily perform. This man had to take a chance, and there was an accident. A My view is that the sooner it is recognised as being the law that a person who drives a motor vehicle under modern conditions is in precisely the same position as, for instance, that of a surgeon or a person who undertakes to perform an extremely difficult task, involving extremely dangerous consequences for other persons, the better. The standard of B care and skill which the law must demand from the driver of a motor car to-day is a very high one indeed. A motor car has become a lethal weapon. It may be that pedestrians very often feel that it is so. We know that the motor car kills thousands of pedestrians, but I have never heard of a single pedestrian, or of a thousand pedestrians combined, who C killed one motor car. The standard of care and skill which the law requires to-day in the driver of a motor vehicle is very high indeed. I think that in this case there was a departure from that very high standard of care, a standard which it is impossible to reconcile with the discharge of the duties of drivers of public vehicles. D

In the result, if that be the right view of the law, those tests have to be applied. The plaintiff has succeeded in the action, and all I have to consider is the amount of the damages to be awarded to her. I do not think that she was hurt very much. She put a very good face on what was a very nasty accident for one of her age. She has not made much E fuss about it, and she has made a complete recovery. Her special damages must be considered too, though they do not amount to much. I think that, if I award her £100 all told, that will represent adequate and proper compensation.

Judgment for the plaintiff for £100.

Solicitors: *Silverman & Livermore* (for the plaintiff); *W. H. Baines*, Town Clerk, Liverpool (for the defendants).

[Reported by GERALD ABRAHAMS, Esq., Barrister-at-Law.]

FISHER v. WINCH.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Goddard, L.JJ.), February 17, 1939.]

Boundaries—Boundary shown on title deeds—Hedge and ditch—Presumption—Whether evidence of deeds prevails over presumption.

The position of a hedge and ditch as affording evidence of the boundary between adjoining properties is a presumption merely, and, if the title deeds of the properties show a different boundary between the properties, that presumption is thereby rebutted.

[EDITORIAL NOTE. Some confusion appears to have arisen as to whether the evidence of the title deeds as to the boundary was more cogent than that of the presumption arising from the relative positions of the hedge and the ditch. It is now clearly settled that, where the title deeds show a definite boundary, this prevails over the presumption.

AS TO HEDGES AND DITCHES AS BOUNDARIES, see HALSBURY, Hailsham Edn., Vol. 3, pp. 144, 145, paras. 249, 250; and FOR CASES, see DIGEST, Vol. 7, pp. 278-280, Nos. 101-118.]

Case referred to :

(1) *Collis v. Amphlett* (1919), 89 L.J.Ch. 101; 7 Digest 317, 370; 122 L.T. 433; *revisg.*, [1918] 1 Ch. 232.

B APPEAL by the plaintiff from a judgment of HUMPHREYS, J., dated July 28, 1938. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

Harold J. Brown for the appellant.

C. J. T. Pensotti for the respondent.

C

SIR WILFRID GREENE, M.R. : The appellant in this case, the plaintiff in the court below, who is the owner of a small piece of land on which a house is built at Colgate, near Horsham, complains that her neighbour, the defendant, has trespassed upon a portion of her land, being the land lying along the boundary. The dispute between the parties is as to the precise boundary between their respective properties. The judge decided this case in favour of the defendant upon one point alone. He proceeded upon the footing that a well-known presumption was to prevail—namely, that, where there is nothing else to identify the boundary, and there is a ditch and a bank, the presumption is that the person who dug the ditch dug it at the extremity of his land and threw the soil on his own land to make the bank. That, of course, is a very convenient rule of common sense, which applies in proper cases in regard to agricultural land, where there is no boundary otherwise ascertainable. It also assumes what is not necessarily the fact—namely, that, at the time when the ditch was dug, there was no common ownership of that piece of land and the land on the other side of the ditch. The judge, thinking that the case was governed entirely by that presumption, decided in favour of the defendant, but he did not direct his mind to what in this case is the initial question—namely, what, on the true construction of the conveyances to the parties, the boundary of their respective land is. If an examination of those conveyances, coupled with any evidence that is admissible for the purpose of construing them, shows what the boundary is, there is no room at all for the operation of that presumption. The judge did not direct his mind to that question, but, in my opinion, the present controversy is solved without difficulty when that question is considered.

H

It appears that the land of both parties was, before Oct., 1922, in common ownership. It had been owned by a Mr. Saillard. That gentleman died, and in 1922 his trustees sold his estate. It was, we are

told, a very large estate at Colgate. As between these two parties, the first land conveyed by those trustees was the defendant's land, which was conveyed to a predecessor in title of the defendant by an indenture of Oct. 30, 1922, made between the trustees, of the one part, and Mrs. Sarah Ann Johnson, of the other part. The parcels in that conveyance are as follow :

A

All that messuage tenement or tenement or farmhouse and farm with the out-houses thereon together with the several closes pieces or parcels of land belonging thereto called or known as Dairy Farm situate in the parish of Colgate and county of Sussex containing by estimation 16'316 acres or thereabouts and now in the occupation of the purchaser all which said premises are more particularly described in the first schedule hereunder written and are delineated in the plan drawn hereon and thereon coloured green.

B

Then the first schedule sets out by reference to the numbers on the ordnance map the different parcels, with their description and acreage, which were comprised in the conveyance. That conveyance had a plan delineated upon it, and in that plan the ordnance survey numbers, with the acreage which corresponds with the ordnance survey acreage, are shown. It is quite clear from a comparison of that plan with the language of the schedule that the plan is copied from the ordnance survey, and, in fact, I think that that was not disputed.

C

The conveyance to the plaintiff's predecessor in title was dated on the following day, Oct. 31, 1922. A Mr. Charles Gent was the purchaser, and he purchased what is now the plaintiff's land, together with other adjoining land. The parcels in that conveyance are as follow :

D

All that piece or parcel of land situate in the parish of Colgate in the county of Sussex containing by admeasurement 3.261 acres or thereabouts and numbered 214 on the ordnance survey map for the said parish which said piece or parcel of land for greater clearness and by way of identification only is delineated on the plan drawn hereon and thereon coloured green.

E

I should have said that the plan contains the ordnance number with the ordnance acreage, and is quite clearly copied from the ordnance survey.

It is to be noticed, in comparing those two conveyances, that there is a difference in wording, because the conveyance under which the defendant claims uses the plan and the schedule as descriptive, and not merely for identification, whereas in the later conveyance the measurement is given and the number is given, but the plan is only "for greater clearness and by way of identification only." However, once the question as to what the defendant's predecessor in title got under his conveyance is decided, no difficulty arises as to what the plaintiff's predecessor in title got under his conveyance, and the real question is what the defendant got. There was some evidence called on that matter which was, in my judgment, entirely inadmissible—namely, that of a Mr. Young, a solicitor practising in the neighbourhood, who gave evidence which was really evidence as to the way in which conveyances in country districts ought to be construed. That was the effect of his evidence, and, in my judgment, it was clearly inadmissible. However, there were two pieces of admissible evidence, one relied upon by Mr.

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G

H

Brown for the appellant, and one quite rightly relied upon by Mr. Pensotti for the respondent. The evidence relied upon by Mr. Brown was the evidence of a Mr. Emery, who was employed in the ordnance survey, and high up in that service, and who gave evidence as to the universal practice in making up the ordnance survey maps. The effect
A of that evidence is that, where there is a hedge or a fence running along a parcel, that is the boundary which is taken by the ordnance survey for the purpose of delimiting the parcels which are shown on those maps. Of course, the fact that the boundary is shown in a particular place on an ordnance map is in itself no evidence of what the true boundary
B is as between the parties, but, where the party's title is derived from a document which refers to the ordnance map, it is necessary to look at the ordnance map and ascertain where the boundary shown on that map is truly positioned. The evidence of Mr. Emery in this case is, to my mind, quite conclusive that in the present case the boundary of
C the land conveyed to the defendant's predecessor in title is positioned along the middle line of the old hedge, which runs along one of the disputed boundaries, and along the fence, which runs along the other disputed boundary. Those have been there for many years, and there can be no question, on Mr. Emery's evidence and the other evidence
D in the case as to those fences and hedges, that the boundary referred to on the ordnance survey map is the centre line of the hedge and the fence. That being so, when the conveyance is looked at, the boundaries on which are traced by reference to the ordnance survey and the acreage of which is fixed by reference to the ordnance survey, it is established
E beyond possibility of question what the boundary is. The boundary is shown in both places to be quite clearly in the position that I have indicated.

The piece of evidence on which Mr. Pensotti relied perfectly legitimately was this. One witness, who was the brother of Mrs.
F Johnson, speaking of the time when she was apparently tenant of the property, said that he had dug out some mud from one of the ditches and taken it to put upon marrow-beds. That is relied upon as evidence that at that time the ditch was in the occupation of Mrs. Johnson, the predecessor of the defendant. It is perfectly proper to refer to it, but
G it is, to my mind, only one element in the matter, and is entirely outweighed by the other matters to which I have referred. Moreover, the reference in the conveyance to the occupation of the purchaser, Mrs. Johnson, does not import that under that conveyance she was getting everything of which she was in occupation, and, even if, contrary to
H my view of the evidence, there was sufficient evidence that she was in occupation of that particular ditch, the effect of the conveyance was not necessarily to convey it to her.

That is really an end of the case. The appeal has been necessary because, as I have said, the judge, thinking that the governing matter was the presumption, and not observing that the presumption comes

into operation only in cases where the boundary is not delimited in the parcels to the conveyance, decided the other way, and he made observations about the conduct of the plaintiff in first of all not agreeing to arbitration by a surveyor and then not agreeing to go to the county court. Those observations really lose their point, in view of the decision to which this court has come. A

MACKINNON, L.J.: I agree. I think it not without interest to observe that a somewhat similar question arose in 1917, and that SCRUTTON, L.J., delivering a dissenting judgment in *Collis v. Amphlett* (1), said, at p. 259: B

There is undoubtedly a popular belief in some parts of the country which has found its way into books that the owner of a hedge is also the owner of a space outside it; sometimes said to be 4 ft. from the base of the bank on which the hedge stands. I am not aware of any legal authority for this broad proposition.

When that case went to the House of Lords, the dissentient judgment of SCRUTTON, L.J., was upheld, and the appeal was allowed. C

GODDARD, L.J.: I agree. I want to add only one word. This matter of the respective position of the fence and the ditch as affording evidence of the boundary was referred to both in the defence and throughout the trial—which I think possibly explains some of the confusion that arose—as a custom. It is not a custom at all, when rightly understood. It is a mere presumption. It is a very different thing from a custom. There is a presumption which is in use, and it is very often decisive where there is no evidence at all as to what the boundaries are, but, like any other presumption, it is rebuttable, and very often it can easily be rebutted by the production of title deeds. In this case, when the title deeds are examined, there is no room for the operation of the presumption at all. D

Solicitors: *Waller, Neale & Houlston*, agents for *Marsh & Ferriman*, Worthing (for the appellant); *Blyth, Dutton, Hartley & Blyth*, agents for *Coole & Haddock*, Horsham (for the respondent). E

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

GALENE v. GALENE (OTHERWISE GALICE). G

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
March 3, 1939.]

Nullity—Petition—French person's marriage in England—French domicile—Marriage invalid according to French law—Nullity decree pronounced by French court—Competency of English petition—Jurisdiction. H

The petitioner was married at a register office in England in 1921. His domicile was then French. The marriage was subsequently annulled by a court of competent jurisdiction in France on the ground of informality in French law. There was no appeal from that decision:—

HELD: upon proof of these facts, the petitioner was entitled to a decree of nullity.

[EDITORIAL NOTE.] This case follows precisely the decision in *De Massa (otherwise Horveno) v. De Massa* (1). As the latter case was not reported at the time, the details thereof are appended as a note to this case.

AS TO JURISDICTION IN NULLITY, see HALSBURY, Hailsham Edn., Vol. 10, p. 640, para. 935; and FOR CASES, see DIGEST, Vol. 27, p. 265, Nos. 2326, 2327.]

Cases referred to :

- A (1) *De Massa (orse. Horveno) v. De Massa*, [1939] 2 All E.R. 150, n.; Digest Supp.
- (2) *Salvesen (or von Lorang) v. Austrian Property Administrator*, [1927] A.C. 641; Digest Supp.; 96 L.J.P.C. 105; 137 L.T. 571.

UNDEFENDED PETITION by husband for nullity. The petitioner, B M. Charles Paul Galene, went through a ceremony of marriage with the respondent at the Register Office, Paddington, on Dec. 22, 1921. He was residing in England, but at all material times he was a French citizen domiciled in France. He was then aged 21 years, and the respondent was then aged 23 years. In 1922, the petitioner returned C to France, and thereupon the petitioner's father instituted proceedings for nullity of marriage in respect of the English marriage on the ground of informality in French law. On June 8, 1923, the Civil Tribunal of First Instance at Bordeaux declared that the form of marriage in England was null and void by reason of, *inter alia*, (i) non-publication D of banns (contravening art. 63 of the Civil Code), (ii) non-consent of the petitioner's father, and (iii) failure to record the marriage in the register of civil status in France (contravening art. 171 of the Civil Code). The French proceedings were undefended, and no appeal was brought in regard to the matter. The material paragraphs of the present E petition were as follow :

3. Your petitioner . . . is a French citizen and is and was at the time of the form of marriage domiciled in France.

5. On June 8, 1923, the Civil Tribunal of First Instance of Bordeaux in the Republic of France being the court in that behalf declared that the form of marriage between your petitioner and the respondent in London on Dec. 22, 1921, was null and void by the laws of France as being clandestine and in fraudulent F evasion of the laws of France.

The prayer asked that the court should decree :

. . . that the form of marriage of Dec. 22, 1921, was and is null and void.

The petitioner gave evidence producing a certified copy of the order of G the French court and a certificate that there had been no appeal therefrom. An expert witness testified as to the French law, and the grounds upon which the order of the French court had been made. The question arose as to whether, at the material time, the English court had jurisdiction to pronounce a decree, the marriage having already been annulled H by a competent court in France.

Julian Fuller, for the petitioner : This is an unusual case. It is on all fours with the decision of LORD MERRIVALE, P., in *De Massa (orse. Horveno) v. De Massa* (1), which is cited with approval in the text-books and legal journals, and which carries into effect the general principle laid down in *Salvesen (or von Lorang) v. Austrian Property*

Administrator (2)—namely, that a judgment of the competent court of the domicile is a judgment *in rem*, which must be recognised and enforced by the English court, unless it is obtained by fraud, collusion, or other unlawful means.

HENN COLLINS, J. : I pronounce a decree *nisi* of nullity.

Solicitors : *Barry O'Brien & Co.* (for the petitioner).

[Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

NOTE.

The following is the judgment in *De Massa (otherwise Horveno) v. De Massa* (1) referred to in the above case. The judgment was delivered by LORD MERRIVALE, P., on Mar. 30, 1931, the material facts being as follow. The petitioner, Claire Marie Lucie de Massa, *née* Horveno, a minor, sued by her guardian *ad litem*, Clair Marie Leonard Horveno, her father. The petitioner went through a form of marriage with the respondent, Raoul Hildebrand de Massa, a Frenchman, at the Register Office, Paddington, on July 28, 1927, she then being 18 years of age. Thereafter they lived together at an address in London for three weeks. Shortly afterwards, the petitioner returned to France, and had not seen the respondent since. On July 4, 1930, a decree of the French court was obtained annulling the English marriage on the ground that the petitioner's father had not given his consent to the marriage as required by French law.

R. F. Bayford, K.C., Walter Frampton and Julian Fuller for the petitioner.

LORD MERRIVALE, P. : The petitioner is a young French woman who by French law could not be married without the consent of her parents. That consent never was obtained. The ceremony of marriage was performed at an English register office. Later, the man with whom the ceremony was performed disappeared. The case came on for hearing here for a decree of nullity, but it seemed to me that the petition for nullity in such a case—where the respondent was a French subject and the domicile, I took it, by reason of the marriage, was a French domicile—was necessarily a matter for a French tribunal. That view has been taken, but the case had not proceeded on that footing up to the time that it came into court, and, therefore, it became necessary to adjourn it. A French tribunal of competent jurisdiction has annulled the marriage, and that declaration of nullity has come into operation. All that it is necessary for me to do now, the facts being in due order, is to declare the marriage to have been null and void, citing the judgment of the French tribunal as a judgment between the parties.

Solicitors : *Martin & Barry O'Brien* (for the petitioner).

GREENWOOD v. GREENWOOD.

[PRIVY COUNCIL (Lord Thankerton, Lord Romer and Lord Porter),
January 16, February 2, 1939.]

Privy Council—Fiji—Will—Construction—Class gift—Gift postponed to life interest—Substituted gift for children of member of class dying during life of tenant for life—Death of member without issue during life of tenant for life—Vesting.

The testator, who died without issue but was survived by his wife, devised all his real and personal property upon trusts to pay the income from his estate to his widow for her life, with power to dispose of an undivided third share in the whole of the property, by will, in any manner she should wish, and directed his trustees "to divide the remaining two-thirds equally amongst all my brothers and sisters now living and if any of them shall have predeceased my wife then to the child or children of such brother or sister shall be given the share such brother or sister would have received if alive." The widow of the testator was predeceased by a sister of the testator, who had survived

him but had died unmarried and without issue. A question having arisen, on the death of the widow, as to whether or not the estate of the testator's deceased sister was entitled to share in the distribution of the two-thirds forming the residuary estate to the testator's brothers and sisters, a summons was issued for the determination of this question :—

HELD : the right to the two-thirds of the residuary estate vested in the brothers and sisters of the testator upon his death, and such a vested interest could only be defeated by a clause of divestiture or one of forfeiture in a given event. The representative of the testator's deceased sister was, therefore, entitled to a share in the estate.

[EDITORIAL NOTE.] In determining who are the members of a class, it has to be considered when the gift vests. All members of the class who satisfy the definition of the class at the time of vesting take under the gift, although the time for distribution may be postponed. In the case, therefore, of one of the class dying after the vesting and before the time for distribution, the estate of that member will be entitled to the share of that member in the estate.

AS TO EFFECT OF DEATH BEFORE DISTRIBUTION, see HALSBURY, 1st Edn., Vol. 28, pp. 715-717, para. 1339; and FOR CASES, see DIGEST, Vol. 44, pp. 1074-1082, Nos. 9269-9334.]

Cases referred to :

- (1) *Browne v. Moody*, [1936] A.C. 635; [1936] 2 All E.R. 1695; Digest Supp.; 105 L.J.P.C. 140; 155 L.T. 469.
- (2) *Hurst v. Hurst* (1882), 21 Ch.D. 278; 44 Digest 433, 2600; 51 L.J.Ch. 729; 46 L.T. 899.
- (3) *Smither v. Willock* (1804), 9 Ves. 233; 44 Digest 1075, 9274.
- (4) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 43 Digest 643, 790; 15 L.T.O.S. 557.
- (5) *Hancock v. Watson*, [1902] A.C. 14; 43 Digest 644, 792; 71 L.J.Ch. 149; 85 L.T. 729; *affg.* S.C. *sub nom.* *Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482.

APPEAL from an order of the Supreme Court of Fiji (CORRIE, C.J.), dated Sept. 27, 1937, on an originating summons issued by the appellant, as the surviving trustee of the estate of George Freeman Martin, on Aug. 12, 1937. The facts of the case are fully set out in the judgment of their Lordships delivered by LORD THANKERTON.

Wilfrid M. Hunt for the appellant.

The respondents had entered an appearance in the appeal, but did not appear at the hearing of the appeal.

LORD THANKERTON : This is an appeal from an order of the Supreme Court of Fiji, dated Sept. 27, 1937, on an originating summons issued by the appellant as the surviving trustee of the estate of George Freeman Martin, deceased, on Aug. 12, 1937. George Freeman Martin (hereinafter called the testator), died on July 28, 1912, leaving a will dated June 13, 1912. He died without issue, but was survived by his wife, Catherine Helen Rose Annie Martin, and a number of brothers and sisters, including a sister Elizabeth Martin. Under his will, the testator appointed his wife and the appellant, who was his nephew, to be his trustees and executors, and he thereby gave all his property, both real and personal, to his trustees upon the trusts set out therein. Under these trusts, after pay-

ment of debts, etc., and delivery of a legacy of livestock, and subject to the payment of certain annuities, the widow enjoyed the use of the testator's household furniture and effects and house and buildings, and the free income of the estate during her life. The will proceeds as follows :

... and as to the whole of my property remaining at the death of my wife I hereby direct and empower my said wife to dispose of any undivided third share or interest in same by will to any person or persons and in any manner she may wish in as full and ample a manner as I myself could now dispose of such third share or interest and I direct my surviving trustee to sell and realise all of my said property remaining at the death of my wife and to apply the third of the proceeds in terms of the will of my said wife and to divide the remaining two-thirds equally amongst all my brothers and sisters now living and if any of them shall have predeceased my wife then to the child or children of such brother or sister shall be given the share such brother or sister would have received if alive.

The widow of the testator died on Apr. 21, 1936, but she was predeceased by the testator's sister Elizabeth Martin, who had survived the testator, but had died on May 15, 1915, unmarried and without issue. The appellant, as executor of Graham Lord Greenwood, the executor nominate of Elizabeth Martin, now represents her estate. On the death of the widow, the period of distribution of the two-thirds of the residuary estate given to the testator's brothers and sisters arrived, and a question arose as to whether the estate of Elizabeth Martin was entitled to share in the distribution. This summons was issued for determination of that question. The respondents are the brothers and sisters of the testator, or persons claiming under them, and the executor of the widow. The summons was heard by CORRIE, C.J., who gave judgment on Sept. 27, 1937, by which he held that the share which Elizabeth Martin would have received, had she survived the testator's widow, was undisposed of by the will, and fell to the testator's heirs *ab intestato*, and he made an order of the same date to that effect, which is now appealed against. The respondents did not appear at the hearing before this Board, though they had entered appearance in the appeal.

The only case referred to in the judgment of CORRIE, C.J., is a decision of this Board in *Browne v. Moody* (1). The view of CORRIE, C.J., is expressed as follows :

It is argued—and all parties who have appeared before me have taken this view—that the facts in the present case are indistinguishable from those in *Browne v. Moody* (1). I am unable to accept that view. In *Browne v. Moody* (1), the interest which vested in one of the named beneficiaries upon the death of the testatrix was liable to divestiture in the event of the beneficiary predeceasing the life tenant leaving issue. In the present case, the “specified contingency” upon the happening of which the interest which vested in a brother or sister of George Freeman Martin upon his death is subject to divestiture is expressed in the words “and if any of them shall have predeceased my wife.” That is to say, if a brother or sister predeceased the life tenant, divestiture occurred whether or not such brother or sister died leaving issue. Elizabeth Martin has predeceased the testator's widow. The event upon which divestiture of her interest was to take place has occurred, and her representative is not entitled to the share which she would have received if she had survived the life tenant.

There remains, therefore, the question in whom such share is now vested. The answer to that question in the will is in the following terms : “then to the child or children of such brother or sister shall be given the share such brother or sister would have received if alive.” Upon the further question in whom is such share is to

vest in the event of there being no child of such brother or sister, the will is silent. That is to say, in the events which have happened, the testator has died intestate in respect of the share of his estate which his sister Elizabeth would have received, if she had survived his wife.

A It has been argued that the testator must be taken not to have intended an intestacy and must have intended that the will should be read as though the contingency upon the divestiture of the interest of a brother or sister of the testator was to occur were "if any of them shall have predeceased my wife leaving issue." However, as LORD MACMILLAN said, quoting with approval the observation of RINFRET, J., in *Browne v. Moody* (1) [p. 644], "the golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language which he has used," and I do not find manifested in the language of the testator the intention suggested.

B It is to be regretted that CORRIE, C.J., did not continue the last quotation from the judgment delivered by LORD MACMILLAN in *Browne v. Moody* (1), for it proceeds, at p. 644 :

C but in the present instance they do not find manifested in the language of the testatrix the intention which the Supreme Court have distilled from it. The testatrix has made her testamentary dispositions in terms of very ordinary occurrence from which the courts in a long series of cases have drawn a contrary inference as to intention.

D In the first place, their Lordships are clearly of opinion that a right to the two-thirds of the residuary estate vested in the brothers and sisters of the testator upon his death. The language of the present will is even clearer than the terms of the will in *Browne v. Moody* (1), and it is unnecessary to recapitulate the authorities for this well-established rule of construction, which are fully discussed in the judgment in that case. CORRIE, C.J., appears to accept the view that vesting did so take place, but, if so, it is equally well established that such a vested interest will only be defeated by a clause of divestiture expressed in favour of someone else in a given event, or a clear and unambiguous clause of forfeiture in a given event. In the present case, there is no such clause of forfeiture, and the only direction for divestiture in favour of someone else is that expressed in favour of the issue of a legatee who has predeceased the widow. CORRIE, C.J., would appear to have treated the general mention of predecease of the widow as inferring a forfeiture of the vested interest of the legatee who predeceased the widow without issue, but it is settled that such a forfeiture must be clearly expressed as such. An illustration of such a forfeiture is to be found in *Hurst v. Hurst* (2), in which SIR GEORGE JESSEL, M.R., said, at p. 293 :

G This does not agree with the words of the will, which are that the bequest to the child transgressing the condition shall be "absolutely forfeited." The intention of these words is clear. There are cases in which it is plain that the original gift was not intended to be defeated unless there were objects to take under the gift over, as, for instance, in cases of substitutionary gifts to children ; but here we have an intention separately declared that the gift is to be forfeited.

H The present case cannot be distinguished from *Smither v. Willock* (3), in which the testator left his personal estate and money to his wife for her life and from and after her death the capital to be divided between the testator's brothers and sisters named in the will in equal shares, but, in case of the death of any of them in the lifetime of the wife, the shares of him or her so dying to be divided between all and every his, her or their

children. One of the brothers died in the lifetime of the widow, without ever having had a child. SIR WM. GRANT, M.R., declared the share of the deceased brother to be vested subject only to the event of his death in the lifetime of the testator's widow leaving children, and, consequently, that event not having happened, his representative was entitled. Reference may also be made to *HAWKINS ON WILLS*, 3rd Edn., p. 318, where other cases are cited, and the same principle of construction appears to be implicit in what is sometimes called the rule in *Lassence v. Tierney* (4), which is thus expressed by LORD DAVEY in *Hancock v. Watson* (5), at p. 22 :

For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be.

Their Lordships are, therefore, of opinion that Elizabeth Martin's share of the residue vested in her on the death of the testator, subject to divestiture only in the event of her predecease of the testator's widow leaving a child or children, and that, such event not having occurred, her representative is now entitled to her share. Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the order of the Supreme Court should be set aside, and that there should be substituted therefor a declaration in the above terms. As requested by the appellant, the costs of all parties as between solicitor and client in this appeal and in the court below will be paid out of the share.

Appeal allowed.

Solicitors : *Vandercom, Stanton & Co.* (for the appellant).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

NATIONAL REAL ESTATE AND FINANCE CO., LTD. v. HASSAN.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.) **March 21, 1939.**]

Landlord and Tenant—Repairs—Forfeiture—Notice of forfeiture—Retrospective operation of statute—Leasehold Property (Repairs) Act, 1938 (c. 34), ss. 1, 5.

Practice—Preliminary point of law—Terms of order—Necessity to define point of law—R.S.O., Ord. 25, r. 2.

The plaintiffs, as the lessors of property of which the defendant was tenant, served a notice to repair under the Law of Property Act, 1925, s. 146 (1), on Jan. 12, 1937. On July 13, 1937, the plaintiffs issued a writ claiming possession of the demised premises on the ground of their want of repair, and the defence to the action thus commenced was a claim for relief under the Law of Property Act, 1925, s. 146. On June 23, 1938, the Leasehold Property (Repairs) Act, 1938, came into operation, and on Oct. 28, 1938, the defendant obtained leave to amend her defence by adding a new paragraph to the effect that she would rely on the Act

of 1938. It was contended that the Act had no such retrospective operation as would make it available to the defendant in this action :—

HELD : (i) this was not a matter of procedure.

(ii) the Act of 1938 was not intended to alter rights which became vested before it came into operation, and the defendant was not, in the circumstances of this case, entitled to rely on the Act of 1938.

(iii) where an order is made under R.S.C. Ord. 25, r. 2, that a preliminary point of law be set down for hearing, that order should set out the point of law in precise terms.

Decision of CROOM-JOHNSON, J. ([1939] 1 All E.R. 712) reversed.

EDITORIAL NOTE. The question in this case is purely one of the retrospective effect of the Leasehold Property (Repairs) Act, 1938. It should be carefully noticed that in the present case the action was commenced before the passing of the Act, and that the Act requires the tenant to give a counter-notice within 28 days of the service of the notice under the Law of Property Act, 1925, s. 146 (1), which period had long since expired when the Act of 1938 came into operation. The basis of the decision in the present case is that the giving of a notice before the Act came into operation had the effect of vesting certain rights in the party giving the notice and as to such rights the Act has no retrospective operation. For this reason the operation of the Act is not purely procedural, and the principles to be applied are not those relating to the retrospective effect of Acts dealing with matters of procedure only ; but those relating to the effect of Acts making substantive alterations in the law. This was an appeal from the trial of a preliminary issue of law, and it may be noticed that no objection was taken to its inclusion in the list of interlocutory appeals. It has been an open question whether such appeals are in law interlocutory appeals. The fact that no objection was taken in this case, though not conclusive of the question, is at any rate some indication of the right view on this point.

AS TO RELIEF AGAINST FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 257-260, paras. 290-292 ; and FOR CASES, see DIGEST, Vol. 31, pp. 483-487. Nos. 6322-6353.]

Cases referred to :

- (1) *Hickson v. Darlow* (1883), 23 Ch.D. 690 ; 42 Digest 704, 1204 ; 52 L.J.Ch. 453 ; 48 L.T. 449 ; *on appeal*, 23 Ch.D. 693.
- (2) *The Ydun*, [1899] P. 236 ; 42 Digest 699, 1156 ; 68 L.J.P. 101 ; 81 L.T. 10.
- (3) *Quilter v. Mapleson* (1882), 9 Q.B.D. 672 ; 42 Digest 696, 1111 ; 52 L.J.Q.B. 44 ; 47 L.T. 561.

APPEAL by the plaintiffs from a decision of CROOM-JOHNSON, J., dated Feb. 17, 1939, and reported [1939] 1 All E.R. 712. The facts are fully set out in the judgment of SCOTT, L.J.

Ralph Etherton for the appellants.

G. J. Lynskey, K.C., and *W. Geddes* for the respondent.

Etherton : Sect. 1 of the Act of 1938 does not apply to this case at all. It is not a question of procedure. The Act is not available in support of the respondent's case, because the lessee was not in a position to serve the counter-notice required by sect. 1 of the Act. Nothing in sect. 5 can alter that fact. The judge was wrong in holding that the effect of sect. 5 was to bring sect. 1 into operation. Sect. 5 is quite definite as to the extent to which the Act is retrospective. If the legislature had intended it to apply to the position in this case, it would have said so clearly. The words of sect. 1 (1) are inconsistent with the

Act being retrospective. As to the retrospective effect of an Act of Parliament, the law must be that which is set out in MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., p. 189.

Lynskey, K.C.: In considering the Act, the court may consider the mischief to the avoidance of which the legislation was directed. Sect. 5 considered with sect. 1 (4) affects the notices served under the Law of Property Act, 1925. The county court may refuse leave if the enforcement of the Act would cause an injustice. Sect. 5 is the overriding section. It shows that the Act is retrospective. It is not ambiguous. It is unqualified, and applies to breaches of covenant. The Act is purely a procedural Act. It indicates what an owner must do before he can enforce a forfeiture. [Counsel referred to MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., p. 199, *The Ydun* (2) and *Quilter v. Mapleson* (3).]

SCOTT, L.J.: This is an action by a company which had become the reversioners entitled to the reversion of a leasehold property upon the expiration of a lease granted in 1851 for a term of 99 years, and therefore expiring in 1950, against a person who was, at the time when the proceedings were brought, the holder of the term in occupation under it. The action was for the purpose of obtaining possession by reason of the breach of a repairing covenant, and possibly also of a painting covenant, and for damages, and for mesne profits. The premises were No. 157, Falkner Street, in the city of Liverpool, a small house which, with the land upon which it stood, was worth less than £100 per annum. It was a lease with repairing and painting covenants and a covenant to yield up the demised premises well and effectually repaired and painted at the end of the term. There was a proviso for re-entry on breach of covenant.

Under the Law of Property Act, 1925, the law in regard to forfeiture on breach of repairing covenants was amended, the provisions in the Conveyancing Act, 1881, being repeated and extended. Under the Law of Property Act, 1925, s. 146 (1), it was provided as follows:

A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice (a) specifying the particular breach complained of; and (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (c) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

Under subsect. (2), it was provided as follows:

Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

In 1938, an Act was passed entitled the Leasehold Property (Repairs) Act, 1938, and it came into force on the day on which it was passed—namely, June 23, 1938. Sect. 1 of that Act provides as follows :

- A (1) Where a lessor serves on a lessee under the law of Property Act, 1925, s. 146 (1) [a notice in accordance with that section when there are still more than 5 years of the lease unexpired which was the case in the present action] the lessee may within 28 days from that date serve on the lessor a counter-notice to the effect that he claims the benefit of this Act.

Then in subsect. (2) there is a comparable provision in regard to a claim for damages. Then subsect. (3) provides as follows :

- B Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court.

Then under subsect. (4) it is provided as follows :

- C A notice served under the Law of Property Act, 1925, s. 146 (1), in the circumstances specified in subsect. (1) of this section, and a notice served under subsect. (2) of this section shall not be valid unless it contains a statement, in characters not less conspicuous than those used in any other part of the notice, to the effect that the lessee is entitled under this Act to serve on the lessor a counter-notice claiming the benefit of this Act. . . .

- D Then subsect. (5) provides as follows :

Leave for the purposes of this section shall not be given unless the lessor proves [that the remedying, the repairing of the house under the repairing covenant, is immediately necessary, and so on] or (e) special circumstances which in the opinion of the court, render it just and equitable that leave should be given.

- E That subsection, it is said, is retrospective in its operation, and it is so urged because the Act by sect. 5 provides as follows :

This Act applies to leases created, and to breaches occurring, before or after the commencement of this Act.

That is all that there is in the new Act which is relevant for consideration F here.

- That being the law, these are the facts to which we have to apply it. The plaintiffs, the landlords, on Jan. 1, 1937, served a notice of breach of covenant to repair, with a schedule of dilapidations, under the Law of Property Act, 1925, s. 146. On July 13, 1937, they issued a G writ claiming recovery of possession by reason of the failure of the defendant to effect the repairs, and damages. The statement of claim in the action is on the ordinary lines of a statement of claim claiming to recover possession under forfeiture rights. On Nov. 4, 1937, the defence was served, admitting the title and the service of the notice H dated Jan. 12, and so on, denying the breaches of covenant, and alleging that, since the receipt of the notice, the premises had been sufficiently repaired, with an alternative plea that the defendant would apply to the court for relief under the Law of Property Act, 1925, s. 146 (2), which I have read. That was the position in the middle of Nov., 1937. On June 23, 1938, as I have said, the new Act came into operation. On

Oct. 28, leave was given to the defendant to amend the defence, and on Nov. 2 the amendment was made in these terms :

In addition to all other grounds of defence the defendant will rely on the Leasehold Property (Repairs) Act, 1938.

The trial was ordered for the Liverpool Hilary Assizes, at the beginning of 1939. Then an application was made under R.S.C., Ord. 25, r. 2, the demurrer rule, that the preliminary point of law should be tried as to whether or not the new amended plea of the Act of 1938 gave the defendant a ground of defence, or any other rights, as pleaded in the new paragraph added to the defence. The order made did not specify what particular question was to be tried under that paragraph of the defence, and the matter was left in that rather undefined form for the issue to be disposed of pursuant to the provisions of R.S.C., Ord. 25, r. 2. It was, I think, agreed before us that it was understood between the two parties that every question open under the new Act was to be covered by that plea, and I read the order as so intending.

The issue came on for trial before CROOM-JOHNSON, J., at the assizes at Liverpool, and, after argument, he delivered judgment on Feb. 17, 1939. As a result of his judgment, an order in favour of the defendant was made reciting that the point of law came on for argument before his Lordship, and going on as follows :

... and the judge deciding the said preliminary point in favour of the defendant, it is ordered by the court that the plaintiffs do pay to the defendant her costs of and incidental to the issue tried herein, such costs to be taxed as between party and party. Leave to appeal.

It is from that order that the appellants, the landlords, appeal to this court.

In my judgment, the appeal succeeds, and succeeds on the broad ground that there is nothing in the Act of 1938 which is intended to alter past rights which became vested before the new Act came into operation by reason of the parties acting upon, and being entitled to act upon, the law as it then stood. The familiar discussion took place before us in this court. Counsel for the appellants, Mr. Etherton, who put the case very succinctly and very clearly, submitted that the judge had applied to the decision of the case a principle of statute interpretation which was not applicable—namely, that the matters in question were mere matters of procedure and that, therefore, he could treat the new Act of 1938 as being of a retrospective effect to the extent of entitling the defendant to the benefit of the new Act. That is really the essential ground upon which the judge decided the case. He cited well-known principles of statute interpretation, to which I think both counsel, on the argument before us, expressed complete homage. The question, in my view, is a very short one. Is there anything in the new statute which takes away rights and entitles the defendant to say that, the landlords having strictly complied with the Act of 1925, and thereby obtained certain rights if they proved that the repairs had not been remedied, the Act dealt simply and

solely with matters of procedure and might be treated as retrospective? In my view, it is wrong to treat the new Act as a procedural Act. Where vested rights are affected, *prima facie* it is not a question of procedure. I am inclined to think that, as a general rule, when one speaks of an Act as being a procedural Act, one means that it is an Act relating to proceedings in litigation. At any rate, there is nothing in this Act which, in my view, entitles one to treat any part of it as having a retrospective effect beyond that type of procedure if any case makes it relevant. If, then, the Act is not procedural in character, is there anything in it which provides that rights shall be affected? Unless there is something which is quite clear in the Act, and which must be so interpreted, the court is not entitled to treat the Act as having a retrospective operation, except on procedural matters.

Mr. Lyskey, for the tenant, relies upon sect. 5 of the new Act. That section provides as follows:

This Act applies to leases created, and to breaches occurring, before or after the commencement of this Act.

There is nothing in that section which says anything as to when the Act is to apply. The language of that section is perfectly consistent. It is intended by Parliament that the proceedings permitted or required under the Act in relation to this question of forfeiture and damages for breach of repairing covenants should be applied in the future, after the Act had become law, but that the Act should have no *ex post facto* retrospective application to steps that had already been taken under the existing legislation before the new Act became law. That is quite clearly so in regard to the provision as to leases created before the commencement of the Act, and, in my view, it is equally true in regard to breaches occurring before the commencement of the Act. It follows, therefore, in my opinion, that there is nothing in this Act whatever to entitle the defendant here to say that she is entitled to avail herself of any provisions of this Act to invalidate any rights which the plaintiffs had acquired before the Act was passed. In my view, the judge ought to have come to the opposite conclusion to that to which he did come, and he ought to have said that sect. 5 of the Act afforded no ground of defence to the defendant. The appeal must be allowed with costs. The result will be, I think, that para. 8 of the defence will be struck out.

MACKINNON, L.J.: I agree. Upon the merits of the judgment below I desire to add nothing, because it seems to me that it is manifestly wrong, and so wrong that I hardly think it necessary to say more than that. I should like, however, to add a word as to the nature of these proceedings.

R.S.C., Ord. 25, r. 2, provides as follows:

Any party shall be entitled to raise by his pleading any point of law . . . by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

In this case, Master JELF on Dec. 21, according to that rule, made the following order :

Upon hearing the solicitors on both sides it is ordered that the action be set down for hearing before a judge alone on a preliminary point of law.

No order under that rule ought ever to be made in such terms. No one can say what is the point of law. It is merely a vague direction that it be set down for hearing on a preliminary point of law, and upon such an order, when it comes before the court, it is inevitable that a good deal of time would have to be wasted in trying to discover what the point of law is. When the judge had heard it, he seemed to have managed somehow to guess what the point of law was, because his order was as follows :

Upon the hearing of the preliminary point of law ordered to be set down, namely, the point of law raised by the defendant in para. 8 of her amended defence. . . .

Para. 8 of the amended defence was as follows :

In addition to all other grounds of defence the defendant will rely on the Leasehold Property (Repairs) Act, 1938.

Again, if one enlarges the order of Master JELF by saying, "It shall be tried on a preliminary point of law—namely, the point of law raised by the defendant in para. 8," I do not know what it means. It might be the point under the Act of 1938, and seems to have been taken to mean a contention that the plaintiffs' action must fail because he did not get leave to issue his writ pursuant to sect. 1 (3) of the Act of 1938. It might also be the point of law that the plaintiffs did not require to obtain any such leave because the defendant had not fulfilled the requirements of that Act of 1938 by serving the counter-notice, and it is only where a counter-notice is served by the defendant that the necessity arises for the plaintiff obtaining the leave of the court to issue his writ. Therefore, there again nobody knows what was the point of law that was to be tried by the court. Moreover, the judge, having got so far—that it meant the point of law raised by para. 8 of the amended defence—does not seem—and I am not surprised—to have the faintest idea what that means, because the rest of that order goes on as follows :

. . . and the judge deciding the said preliminary point of law in favour of the defendant it is ordered by the court that the plaintiffs do pay to the defendant her costs.

What is the result of that ? It seems to be suggested that the effect of it is that it is deciding that the plaintiffs' action must be dismissed because they did not get leave from the county court before issuing their writ. However, as I pointed out, it might equally be that that is not so, because the defendant never served the counter-notice required by the Act of 1938. Except that the result of this hearing before CROOM-JOHNSON, J., resulted in an order that the plaintiffs were to pay certain costs to the defendant, nothing really has been achieved at all. The point of these remarks is that, where advantage is sought to be taken of this

procedure under R.S.C., Ord. 25, r. 2, care should be taken that a real point of law is being raised, and that there should be a clear definition of what the point of law raised is, and it is only in those circumstances that the court can properly deal with the matter, and that the procedure under R.S.C., Ord. 25, r. 2, is any advantage whatever. I agree that
 A this appeal succeeds.

GODDARD, L.J. : I agree, and I associate myself with every word which has fallen from MACKINNON, L.J., as to the wrong procedure that was adopted in this case. I have some sympathy with the judge in this
 B case, because I think that, when one reads his judgment again, as I have just done, it becomes apparent that he did not really appreciate the real point he had to decide. If he had, his order would have been, or ought to have been, that the action should be dismissed, because the point of law which was raised would have finally disposed of the matter between
 C the parties. The judge clearly had no idea whether he was finally disposing of the rights of the parties or whether he was giving some decision which would bind the judge when the case came on for trial. That is not really what he was being asked to decide, as we now know. It is true that, in the early part of his judgment, he said :

D It was agreed between the parties that the point they wish determined, and the only point they wish determined, is whether the Leasehold Property (Repairs) Act, 1938, is retrospective in this regard—namely, that it applies to a case in which, before the passing of the Act, a writ in the action had been issued.

There again I think that the judge lost sight of the real point, because
 E I think that he was really considering whether or not the Act could have any retrospective effect. Of course it can to this extent. Sect. 5 of the Act provides as follows :

This Act applies to leases created, and to breaches occurring, before or after the commencement of this Act.

F It says so in terms. When one remembers the mischief this Act was designed to remedy, it is obvious that, if Parliament had not made that provision, the Act would have had very little effect. The mischief it was designed to remedy was that occurring where speculators buy up small property in an indifferent state of repair, where any sort of schedule of
 G dilapidations can be served upon the tenants, which the tenants cannot comply with. I am not saying that it applies to this case, but the general mischief is that the speculator buys at a very low price, turns out the tenants, and gets the reversion which he has never paid for, which is a great hardship to the tenants. What the judge had to decide in this case
 H was this. The only point that was really material was the point which arises under sect. 1 (4). No point could have arisen, with respect, under sect. 1 (3), because, *ex hypothesi*, no counter-notice had been served by the tenants, because the possibility of their serving a counter-notice could never have arisen. What the judge really had to decide was this : In June, 1937, an action had been commenced in respect of which the

plaintiffs had performed a condition precedent (which then existed) to bringing an action of ejectment—namely, the serving of a notice under the Law of Property Act, 1925. That being so, because an Act comes into operation on June 23, 1938, can it be said that that action must fail because the plaintiff had not served a notice in 1937, which it would have been impossible for him to have served, because the notice which it is suggested he ought to have served was a notice referring to an Act which was not passed until June 23, 1938? If that matter was really present to the judge's mind, I think that his judgment would have taken a different form. It may have been that, in the pressure of business at the assizes, he did not grasp that that was the point. He does not deal with this matter until the end of his judgment, where he says :

He [Mr. Etherton] says that, as there is a section which is dealing with notices and giving rights to the defendant to do certain things, inasmuch as notices are not specified in sect. 5, therefore sect. 5 does not refer to the notices. I think sect. 5 is dealing with breaches of the lease which go fundamentally to the root of the whole matter, and it necessarily covers what I may call the adjectival clauses dealing with the particular way in which those breaches are sought to be enforced.

The judge never applies his mind to the real point. I do not think that he appreciated what the real point was. When one thinks of it, the matter is simply one of common sense. How it could be supposed that Parliament meant to say that notices properly served under an Act which was then in force, and which gave a property owner the right to bring an action, ought to be set aside because they did not contain a reference to an Act which had not then been passed entirely passes my comprehension. It could not be thought that any such thing was intended. It is really a matter of common sense. *Hickson v. Darlow* (1) is ample authority. One can suppose that Parliament never meant such a possibility as this at all. It might well be that, if this Act of 1938 gave additional grounds for relief, or enlarged the scope of the court's power to grant relief, then, as the case comes on to be tried after June, 1938, the court could apply that. That is quite a different consideration. For those reasons, I agree that the appeal succeeds.

SCOTT, L.J. : I would just like to add that I entirely agree with my colleagues' observations upon the working of R.S.C., Ord. 25, r. 2, which I referred to as the demurrer rule.

Appeal allowed with costs.

Solicitors : *Tanner & Worley* (for the appellants) ; *Hyman Isaacs, Lewis & Mills*, agents for *Herbert J. Davis, Berthen & Munro*, Liverpool (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

THORNETT v. BARCLAYS BANK (FRANCE), LTD.

[COURT OF APPEAL (Scott and Clauson, L.JJ.), February 28, 1939.]

Discovery—Production of documents—Inspection—Bankers' books—Bank carrying on investment business—Inspection of entries relating to transactions with customers other than the plaintiff—Interrogatory in lieu of inspection—R.S.C., Ord. 31, r. 19A (3).

A The plaintiff was a customer of the defendant bank's branch at Monte Carlo. She was the owner of a large number of valuable securities which were in the custody of that branch. It was alleged that the bank assumed the duty of investing the credit balances of the plaintiff from time to time, and selling the securities and reinvesting the proceeds of sale, or advising her as to investment in, and sales of, securities. B The plaintiff alleged that she had lost a large sum of money by the unauthorised or negligent dealing with her securities by the defendant bank's servants, and that the bank had earned large commissions by the various transactions. The bank denied all these allegations. The bank had in its possession a book containing a record of commissions on the sales or purchases of investments, some entries in which related to C dealings with the plaintiff's securities, but others related to those with the securities of other customers of the bank. The bank contended that the inspection of this book should be limited to inspection of the entries relating to the dealings with the plaintiff's securities. The plaintiff, on the other hand, contended that inspection of all the entries should be had :—

D HELD : the plaintiff was entitled to inspect all the entries.

[EDITORIAL NOTE. The plaintiff in the present case wished to show by evidence that the investment business of the bank was, in fact, wholly out of proportion to its ordinary business as a bank, and, for this purpose, the entries relating to transactions on behalf of customers of the bank other than the plaintiff were relevant. Their Lordships have suggested that the whole matter might be more conveniently E disposed of by an interrogatory as to the respective amounts or proportion of each class of business, but the bank took the view that inspection of such books cannot be allowed beyond the items relating to the particular customer's dealings. Leave to take this matter to the House of Lords was refused.

AS TO NATURE AND EXTENT OF INSPECTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 374, 375, para. 454; and FOR CASES, see Digest, Vol. 18, pp. 101-105, F Nos. 525-551. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 521-523.]

APPEAL by the plaintiff from an order of ASQUITH, J., dated Feb. 1, 1939. The facts and arguments are fully set out in the judgment of SCOTT, L.J.

G Norman Birkett, K.C., and H. G. Robertson for the appellants.
Valentine Holmes for the respondent.

SCOTT, L.J. : This is an appeal by the defendants in an action brought by the plaintiff against the defendant bank, a company registered in H England under the English companies legislation as Barclays Bank (France), Ltd. The business of the defendant bank is carried on abroad, although the registered office is in this country. It has a branch at Monte Carlo, in the state of Monaco, where it carries on the ordinary business of a banker, which I say without prejudice to the issues raised by the statement of claim in the present case. The plaintiff is a Mrs.

Thornett. Her husband was a rich man, who died on Jan. 9, 1935. He had an account at the bank at the date of his death. Shortly before the date of his death, with the assistance of the bank, he transferred to his wife all the securities that he possessed, which were then in the custody of the bank, and by his will he left to her a life interest in all of which he died possessed. After his death, consequently, his wife was a rich woman. A

The action is brought by her against the bank on the type of allegation that, during 1935, 1936 and 1937, the manager of the bank, a Mr. Chunn, who had in fact married the plaintiff's daughter, and was, therefore, her son-in-law, and who was also throughout these years manager of the Monaco branch of the bank, had in fact dealt with her securities, purporting to advise her about them as if he were acting for the bank and was acting as her stockbroker or adviser, with the result that the whole of her fortune was dissipated during those years, and at the end she was left a poor woman. The allegation of the statement of claim is that the manager was guilty both of negligence in the advice which he gave and of fraud, instanced by Mr. Holmes from the statement of claim by this type of incident—namely, the manager seeking to give her on different occasions during those years false statements purporting to give her a list of her investments showing her to be at the date of the statement a rich woman, whereas in fact those statements were to his knowledge untrue. The case against the bank is that, assuming those facts to be true, the bank had allowed the manager to carry on within the scope of their authority a regular practice or business of advising customers as to their investments, there being at the bank an office where the public were received and seats were provided, and where there was a tape-machine running throughout the day, giving the prices in London and, in the afternoon, I suppose, in New York. There were clerks available to take orders from people who were persuaded by the tape to give orders, or who were advised by the manager to do so. D E F

The bank denies the allegation of negligence and fraud and the giving of advice, and says that it was not within the scope of the authority of Mr. Chunn, who was then the manager, to give clients any advice in such matters. The defendant bank in the ordinary course, after the close of the pleadings, filed an affidavit of documents. The plaintiff's advisers thought that the affidavit was deficient, by reason of its not including in the affidavit all documents relating to the matters in question which were in the possession of the bank. Accordingly, acting under the provisions of R.S.C., Ord. 31, r. 19A (3), relating to discovery, there was filed on behalf of the plaintiff an affidavit alleging in the terms of that order the fact of belief that the defendant bank had in its possession particular documents, or classes of documents, specified in an application in respect of which the affidavit was filed, and that they related to the matters in question in the action. Upon that application being made in July, 1938, Master JELF made an order which, shortly, limited the further G H

discovery of specific books and documents to the entries in a large book containing a record of commissions on the sales or purchases of investments kept by the bank and further documents, making four or five in all, including entries relating to the plaintiff as a customer of the bank, but excluding anything that related to other customers.

- A An appeal by the plaintiff from that order came before MORTON, J., sitting as a vacation judge, on Aug. 9, 1938. Mr. Holmes, who was present—Mr. Robertson, who is junior counsel for the respondents before us, was not there—gave an account of what happened then, and his account was, of course, completely accepted by Mr. Birkett and by Mr.
- B Robertson, for the respondents. At that hearing of the appeal before MORTON, J., there was a long discussion as to whether the order should be limited to the specific entries named in the order of Master JELF or whether it should be in the wider form, particularly as regards a book containing records of commissions earned by the bank on sales of securities.
- C After argument, MORTON, J., made an order giving the plaintiffs what they asked—namely, an order on the defendants to file an affidavit relating to the book as a whole as to whether or not they had it in their possession, and an order with regard to the other documents, differing in a similar way from the orders made by the master.
- D As regards all the other items of discovery, there is nothing before this court, and, therefore, I can limit my observations to the one book about commissions to which I have already referred. That order was made in the vacation, and nothing further happened about it during 1938 or the early part of 1939. There was no appeal from it by either side. I
- E want to pause for a moment to say what was the position in regard to that order. Rule 19A was made 30 or 40 years ago now in a form slightly different from its present form, for the express purpose of getting over a difficulty in relation to discovery. The difficulty arose out of a principle regulating discovery under our system of procedure by putting upon the
- F party whose duty it is to make discovery the burden of honestly swearing what are the documents that are relevant, that affidavit being *prima facie* binding subsequently on the scope of relevance. It was found that documents became omitted accidentally, and there was no procedure to get at them. Hence the specific documents rule, which allowed the
- G opposite party to impeach the completeness of the view of relevance upon which the opposing party's affidavit had been framed. The method allowed to the impeaching party was to file an affidavit saying that, in his belief, there were in the possession of the other party documents which did relate to the matters in question, and he had then to specify what
- H they were. Subsequently, the rule was altered by allowing the affidavit of impeachment to refer to classes of documents, in order to get over the difficulty of specifying the individual documents. The position was that, when an order had been made under that specific documents rule, the ordinary rule of discovery applied, and enabled the party disclosing those documents, as if they had been in the original affidavit, to object to

disclosing individual parts of the documents, and to specify exactly what parts related to the matters in question. A similar rule applied to the claim of privilege.

In my view, that was the position when the plaintiff in this action, after getting a further affidavit mentioning these books, gave notice, as she was entitled to do under R.S.C., Ord. 35, rr. 15, 18, of a desire to inspect the documents so scheduled in the affidavit. Upon that notice to inspect being given under r. 15, r. 18 provides that, if the party served with notice under r. 15 objects to giving inspection, then the court or a judge may, on the application of the party desiring it, make an order for inspection. That is what happened in the present case. The matter came before Master BAKER on the application, and he considered, upon the argument of Mr. Holmes, that MORTON, J., had really disposed of the issue of relevancy on the original summons, and, consequently, he made the order as asked.

An appeal by the defendant bank from that order came before ASQUITH, J., and he too took the view, on the argument of Mr. Holmes, that the matter of relevancy had been thrashed out before MORTON, J., and that it would be wrong to go over the whole ground again and fight out the issue which had then been fought out. Mr. Holmes, in answer to the argument before us of Mr. Birkett, who had submitted to us that that was an erroneous view, and that the defendant bank were still entitled to take the objection that the whole book was not relevant, but only parts of it—namely, the parts that could be dissected and ascertained to relate to the account of the plaintiff as a customer—urged the same contention that MORTON, J., had disposed of the matter, and that the matter ought not to be reopened. He did go so far as to say, in answer to a perhaps tempting question of mine, which I ought not to have put, that he was prepared to contend that it was *res judicata*, and that he thought that there was a decision of the Court of Appeal to that effect. I want to say quite clearly that, in my opinion, the decision of a judge on a specific documents application under R.S.C., Ord. 31, r. 19A, or a further affidavit relating to the named documents or classes of documents, does not pre-judge any detailed question of relevance. I say “detailed,” meaning by that that it does not pre-judge the question of the right to conceal certain entries as being irrelevant, and that sort of thing. That must be so because r. 19A is only a means of compelling a party to perfect the affidavit which was made originally in a defective form by making it complete, leaving open the right of the other party to give notice to inspect under r. 15. Then, on the summons for inspection, the scope of relevance in regard to the contents of a document is, in my view, open. It follows from that that there is no question of the discretion of the judges below in any way limiting the jurisdiction of this court to make whatever order it thinks right. It is a question of principle involved, and we are dealing with that.

On that issue of principle, we are asked by Mr. Holmes to consider the

nature of the action against the defendant bank, and to measure the relevance of this book in question, by considering the kind of evidence that the plaintiff will want, on the assumption of her case being well-founded. There will no doubt be evidence given on her behalf, as Mr. Holmes said to us, about the outside office, with the tape-machine ticking all the time, and the apparently obvious arrangements, as he describes them, for inviting customers to come in and seek advice. I am assuming that he may be in a position to prove those allegations. He says: "If I can prove those, it will be a very important thing for me to be able to show that the volume of business done by this branch of the bank under this head is wholly out of proportion to the rest of its business, as shown by its own published account. I want to be able to produce the broad facts indicated by that, and I do not want any disclosure of individual customers' accounts."

It is necessary to consider, for that purpose, the nature of the book.

We are told by Mr. Birkett—and his statements in this respect are accepted by Mr. Holmes, for the plaintiff—that the book contains no names, but that it is a record of the daily totals of half-commission earned by the bank on all its purchases and sales of customers' securities, with a daily summary of the commission earned, and the means of transferring to the customers' accounts credits or debits, as the case may be, for the purchases or sale of securities, the credits and debits being the net amounts after the deduction or allowance of commission and the other items that ordinarily appear on a stockbroker's note, the bank sharing the brokerage commission with the stockbroker in the usual way, as is well known. In addition, the clerks at the bank make further analyses separately, from which it would be possible ultimately, with immense labour, to dissect the records day by day, and trace out the individual accounts to which they belong. Mr. Holmes says that he does not want any of that detail. All he wants is to get the proportion of business of that kind and what may be called the ordinary banking business of the defendant bank in order to support his case. I asked him if he would be willing to forgo any inspection of the book if he were given answers by the defendant bank to two interrogatories, (i) the total money value of the commission earned by the bank in each of the years in question, 1935, 1936 and 1937, down to the date when the matter was raised, which was in the middle of the year, and (ii) a statement of the number of customers and individual transactions. He said he would be satisfied with that. I asked Mr. Robertson, who was replying, whether he would be willing to give those answers, and he said that he would not be so willing. We have, therefore, to decide the issue. My view is that, to the extent of those two or three interrogatories that I stated, the book does relate to the matters in question, from the point of view of the bulk of the business done. Mr. Holmes thinks that that takes him a long way in the case, or, at any rate, that it is an important factor in the case. He says that, no doubt, knowing the kind of evidence upon which he is relying. I express no

opinion at all about that, but I do myself see that there is that degree of relevance. I think, therefore, that the order of this court should be, not that the inspection of the contents of the book be given, as asked, but that, if the defendant bank will answer the first of my questions—namely, the total of the half-commission earned by the bank on purchases and sales during those 3 years—then the plaintiff should not have A inspection of the book. However, as I think that the book is, to that limited extent, relevant, if the defendant bank is not willing to answer that one interrogatory, then liberty to inspect the whole book must be given. I limit it to the one interrogatory, because I feel quite clear in my own mind that that one fact does relate to the matters in question. B On the number of customers or the number of the transactions I have some doubt, and, therefore, I do not add that.

CLAUSON, L.J. : I agree with the judgment of SCOTT, L.J. I must confess that, while I am unable to say that the magnitude of these trans- C actions is wholly irrelevant, I feel the gravest doubt as to whether the relevance is other than very slender. However, I do not see my way clear to differ from the view which SCOTT, L.J., takes, and I accordingly agree with the judgment as he has delivered it.

Appeal dismissed, unless interrogatory answered within 10 days. No D order as to costs.

Solicitors: *Durrant Cooper & Hambling* (for the appellants); *Allen & Overy* (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

R. v. WELLS.

[COURT OF CRIMINAL APPEAL (Hawke, Humphreys and Lawrence, JJ.),
March 20, 21, 1939.]

Criminal Law—Forgery—Indorsement on deed—False date—Date falsified to avoid effect of pending legislation—Materiality.

A On Mar. 2, 1936, a settlement was executed in favour of an infant aged 6, the appellant being one of the trustees. This deed, the object of which was, if possible, to avoid payment of income tax, contained the usual clause giving a power of revocation with the consent of a third party. It was sent by the appellant's firm to the inspector of taxes, with an application for repayment of tax, and was received back by the firm on Apr. 22, 1936, with a repayment of tax amounting to £42 15s. On May 13, 1936, the Finance Bill, 1936, was published, and, as that bill was drafted, the above deed would have been ineffective for the purpose of claiming repayment of tax, as it was not an irrevocable settlement made before Apr. 22, 1936. On May 20, 1936, an indorsement cancelling the power of revocation, but confirming the deed in all other respects, was executed, but it was dated Apr. 21, 1936. The stamp on the indorsement was dated May 21, 1936. The Finance Act, 1936, as ultimately enacted, was in this respect in the same terms as those of the bill. The appellant was charged with conspiring to utter a forged deed, with forging it, and with uttering the forged deed with intent to defraud. It was contended on his behalf that the document, in so far as it was false, was not false in a material particular at the time when it was made, since the Finance Bill, 1936, might never have been passed into law:—

D **HELD:** the time of making such a settlement irrevocable was the most material matter for the purposes of the deed, and the fact that the making of the settlement irrevocable might subsequently become immaterial, if the bill were not passed into law, had no relevance to its materiality at the time in question. The document was, therefore, a false document within the meaning of the Forgery Act, 1913, s. 1 (2).

E **[EDITORIAL NOTE.** To constitute the crime of forgery, the instrument alleged to be forged must be false in some material respect. The point of the argument in this case is that, at the time the indorsement was made, it was not certain that the indorsement was essential for effecting the purpose in view. The bill might never have become law, or might have been so amended that the indorsement had no effect upon the operation of the deed. This argument is rejected, because, at the time when the indorsement was made, it was thought to be, and in all probability would have been, all-important. The only object in choosing a false date was to obtain a benefit which would not have been obtained had the true date been inserted.

G **AS TO FORGERY AT COMMON LAW.** see HALSBURY, Hailsham Edn., Vol. 9, pp. 583-588, paras. 981-985; and FOR CASES, see DIGEST, Vol. 15, pp. 1043, 1044, Nos. 11,762-11,765.]

Case referred to:

(1) *R. v. Ritson* (1869), L.R. 1 C.C.R. 200; 15 Digest 1044, 11,764; 39 L.J.M.C. 10; 21 L.T. 437.

H **APPEAL** from conviction at the Central Criminal Court of uttering a forged deed. The facts and arguments are fully set out in the judgment of the court delivered by LAWRENCE, J.

J. Millard Tucker, K.C., and J. C. Maude for the appellant.

The Solicitor-General (Sir Terence O'Connor, K.C.) and L. A. Byrne for the Crown.

LAWRENCE, J. [delivering the judgment of the court]: In this case, the appellant was convicted at the Central Criminal Court of uttering a forged deed, and he was sentenced to 17 days' imprisonment and ordered to pay costs not exceeding £100. He was indicted, together with a man named Hancock, who was acquitted, with conspiring to utter a forged deed of settlement, with forging it, and with uttering A that forged deed on Dec. 20, 1937, with intent to defraud. He was convicted of uttering only.

The facts are really undisputed. On Mar. 2, 1936, the defendant Hancock, who was a solicitor, executed a deed of settlement, of which he himself, his wife, and the appellant, who is a chartered accountant, B were the trustees, in favour of his son Peter Hancock, aged 6. This deed was sent by the appellant's firm to the inspector of taxes at Hounslow on Apr. 3, 1936, with an application for repayments of tax for the year 1935-1936. There was a power of revocation in cl. 3 of the settlement. The deed was sent back to the appellant's firm by registered post on C Apr. 21, 1936, and was not delivered to them until next morning. The sum of £42 15s. tax was repaid on this claim.

On May 13, 1936, the Finance Bill was published, and it provided that no such deed was effective for the purpose of reclaiming income tax upon the payments made under it unless it was an irrevocable settlement D made before Apr. 22, 1936, and the attention of the appellant was called to this matter by a bulletin issued to him on May 18, 1936, by a concern called Taxation Practical Service. On May 20, 1936, the appellant and Hancock executed upon the deed of Mar. 2, 1936, an indorsement bearing date Apr. 21, 1936, which cancelled the power of revocation E but confirmed the deed in all other respects. The appellant discussed the matter with a solicitor, Mr. Catlin. The Finance Act was passed on July 16, 1936, the wording of sect. 21 (10) being as follows :

This section applies to every settlement, except a settlement made or entered into before Apr. 22, 1936, which immediately before that date was irrevocable. F

In June, 1937, on behalf of Peter Hancock, and without sending the deed and supplemental deed, the appellant applied to the income tax authorities for a rebate of income tax, and the papers were transferred to another district. Correspondence took place between the appellant and the revenue authorities, and on July 28, 1937, the inspector of G taxes at Richmond, whither the papers had been transferred, wrote to the appellant's firm saying that the deed of Mar. 2, 1936, was invalid under the Finance Act, 1936. There was further correspondence, and on Dec. 20, 1937, the appellant's firm sent the deed of Mar. 2, 1936, together with the supplemental deed of May 20, 1936, to the Richmond H inspector of taxes for inspection, saying :

We consider that your interpretation of the matter is incorrect having regard to the provisions of the deed.

They made no mention, however, of the fact that the indorsement bearing date Apr. 21, 1936, had in fact been executed after that date.

The official who was looking over the file before sending the deed to Somerset House noticed that the carbon copy of the letter sending it back the year before also bore date Apr. 21, and he wondered how the deed could have reached the appellant on the same day. He then looked at the stamp, and found that the deed had been stamped on May 21, 1936. In Mar., 1938, the appellant was invited to call upon the chief inspector of taxes to discuss the points raised in this case, and he kept the appointment on Mar. 15, when he was told that a question had arisen upon the indorsement. Before inviting any comment, the inspector recounted the facts from the point of view of his office, and invited the appellant to make a statement. He ended his observations with a caution, which concluded with the words "used in evidence against you." The appellant replied: "I think I am saying nothing." The inspector repeated his statement and his caution, and the appellant repeated that he had nothing to say, whereupon the interview terminated. The appellant wrote a fortnight later describing the inspector's behaviour as a theatrical display, asking what offence it was suggested he had committed, and asking that authorities should be quoted. The letter was not answered, but on Apr. 26, two identical letters were sent by the Solicitor to the Inland Revenue to the appellant and to Hancock. The letters set out the facts and pointed out that the date appeared to have been falsely stated so that the deed might be treated as being outside the provisions of the Finance Act, 1936, s. 21. They invited an explanation, and concluded with a different, and more correct, caution. The appellant replied that he had acted upon legal advice, that he was not aware that he had ever falsely stated that the date of the execution of the indorsement of the deed was Apr. 21, 1936, and that, as he was now satisfied that the indorsed deed was inadmissible for the purposes of a repayment claim, the claim was formally withdrawn. Proceedings were then instituted, as above stated, against the appellant and Hancock, and, at the trial before the recorder, upon the conclusion of the case for the prosecution, counsel for the appellant submitted that there was no case, and referred to *R. v. Ritson* (1). He submitted that there was no evidence that, on the date on which the deed was executed—namely, May 20, 1936—the date of the deed was material, and that therefore the document was not a forgery, and no subsequent event could make it one. The recorder ruled against this submission, and thereupon evidence was called for the defence. After the trial, which lasted 5 days, the jury found the appellant not guilty of conspiracy and forgery, but guilty of uttering a forged document. From that conviction the appellant appeals.

It is submitted by Mr. Tucker, on behalf of the appellant, in the first place, that the deed of Apr. 21, 1936, was not a false document within the meaning of the Forgery Act, 1913, s. 1 (2), because the time of making the deed was immaterial, since the Finance Bill, 1936, was merely a bill, and might never have passed into law, and that, therefore, since

the document was not a false document, the crime of forgery was not committed. This argument appears to us to involve the proposition that nothing can be material which may subsequently become immaterial. Such a proposition is, in our view, fallacious. On the contrary, the fact that a circumstance may subsequently become immaterial has no relevance to its materiality at the time in question. After the introduction of the Finance Bill, 1936, the time of making a settlement on children irrevocable was the most material matter for decision. The date was, in our judgment, material both to the intention of the parties and to the purposes of the deed. Indeed, the only reason for falsely stating the time in the present case was that the time was thought to be, and in all probability would be, all-important. Where the deed purports to be executed at a certain false time, and the only reason for choosing that false time is that it is desired to obtain an advantage to the parties to the deed by reason of that false time, it is impossible to say that the time is not material.

The second argument which was advanced on behalf of the appellant was that the document was not a forged document because the time was not material at the time when it was made—in May, 1936—and that, therefore, it could not be uttered as a forged document within the meaning of the Forgery Act, 1913, s. 6, in Dec., 1937, even if the circumstances had altered by then. In our opinion, it is unnecessary to decide whether or not this argument is sound, as we have already held that the time was material in May, 1936, when the supplemental deed was executed. The third argument was that the Finance Bill, 1936, cl. 19 (9), if it had been passed as an Act, would have left the supplemental deed untouched, because the settlement was dated Mar. 2, 1936, and it was argued that it was sufficient, according to the true interpretation of cl. 19 (9), if the settlement were made before Apr. 22, 1936, and was irrevocable at the time of the payment made thereunder, which in this case would be Mar. 31. In our opinion, it is unnecessary to decide this question, but, without deciding it, it appears to us that the interpretation put upon cl. 19 (9) is not the true or grammatical interpretation. The only result of the appellant's argument, if it were correct as an interpretation of cl. 19 (9), would be that the forgery committed would be unnecessary, and it would not follow at all that the time was not material. The next argument was that, whatever the true interpretation of the Finance Bill might be, the settlement of Mar. 2, 1936, was in itself irrevocable, in the first place, because the power of revocation contained in that deed did not apply to the covenant to pay the annuity, and, in the second place, because the consent of the third parties was necessary to the revocation of the trusts and powers contained in the deed. It is unnecessary for us to decide this question.

Assuming the construction which is put on the terms of the deed to be the true one, it would appear to us, although we do not decide the point, that the definition of "settlement" in the Finance Act, 1936, s. 21 (9) (b),

disposes of the point. We are inclined to think that every material part of the settlement must be irrevocable. As to the second point, we are inclined to think that, if a settlement is revocable *sub modo*, it is not irrevocable within the meaning of the Act. We are also inclined to think that the settlement could be determined within the meaning of A sect. 21 (8) (b), since it was possible to revoke the trusts of the settlement and to institute no further *cestui que trust*. However, as I have said, in our judgment, it is unnecessary for us to decide upon either the third or the fourth contentions of the appellant as to the construction of the Finance Bill, 1936, cl. 19 (9), or the settlement of Mar. 2, 1936, because, B even if those arguments are right, it merely shows that the supplementary deed was unnecessary. It does not show that the time was immaterial, and, therefore, it does not affect the result in this case.

Mr. Tucker also submitted that the appeal ought to be allowed on the ground that the summing up was inadequate, and, in particular, C that the questions put by the jury at the end of the summing up indicated that they were so confused that the conviction ought not to stand. In our judgment, there is nothing in those questions, or in the way in which the recorder dealt with them, which invalidates the conviction, and we are of opinion that, in general, the summing up of the recorder dealt D adequately with the questions of law and the facts with which he had to deal. For these reasons, the appeal must be dismissed.

Appeal dismissed.

Solicitors : Freeborough & Co. (for the appellant) ; Solicitor of Inland Revenue (for the Crown).

E [Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

FINDING v. FINDING.

F [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton and Henn Collins, JJ.), **March 7, 1939.**]

Divorce—Summary Jurisdiction—Appeal—Time for appeal—Extension of time—Principles upon which court will act—R.S.C., Ord. 59, rr. 12, 16.

G On June 16, 1938, the Croydon justices found that the appellant had deserted his wife. During the following 3 months he negotiated with his wife, and endeavoured to induce her to return to him. He then changed his legal advisers, and the matter was reconsidered by his new advisers. On Jan. 6, 1939, an appeal was entered against the decision of the justices. On an application for leave to appeal out of time, it was contended for the applicant (i) that he had never been in default with his payments, so that the respondent would be no worse off if the appeal were heard H out of time, and (ii) that, before the summons was heard, he had intimated to his legal advisers his intention of appealing :—

HELD : the court must exercise judicially its discretion to extend the time for appealing and will not grant such an indulgence unless an appellant can show that there is something entitling him to it. The present appellant had failed to do this, because he had attempted to establish his rights by means other than appealing, and only when such other means failed did he attempt to appeal.

[EDITORIAL NOTE.] The judgments herein deal quite fully with the matters which should weigh with the court when considering whether or not the time for appealing should be extended. The granting of such an extension of time is wholly within the discretion of the court. At the same time, the applicant must show something which entitles the court to grant him the indulgence asked. It must be remembered that the respondent, after the time for appealing has elapsed, has, so to speak, a vested right in the order against which the appeal is sought to be brought. The applicant, therefore, must show some sufficient reason why this right of the respondent should be ignored. **A**

AS TO TIME FOR APPEAL, see HALSBURY, Hailsham Edn., Vol. 10, p. 849, para. 1357; and FOR CASES, see DIGEST, Vol. 27, p. 569, Nos. 6278-6280.]

Case referred to :

- (1) *Re Manchester Economic Building Society* (1883), 24 Ch.D. 488; 10 Digest 1051, 7353; 53 L.J.Ch. 115; 49 L.T. 793. **B**

APPEAL out of time by husband from a decision of the Croydon justices, dated June 16, 1938, adjudging him guilty of desertion. The facts are fully set out in the judgment of LANGTON, J. **C**

R.S.C., Ord. 59, rr. 4A, 12, 16, provide as follow :

4A. Appeals under the Summary Jurisdiction (Married Women) Act, 1895, s. 11, from an order made or the refusal of an order under that Act shall be heard by a Divisional Court of the Probate, Divorce, and Admiralty Division. Rules 7, 8, 10, 11, 12, and 16 of this order shall apply to such appeals, the words "Divorce Registry" being deemed to be substituted in r. 11 for the words "Crown Office Department of the Central Office." **D**

12. The notice of motion shall be served and the appeal entered within 21 days from the date of the judgment, order, or finding complained of; such period shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or from the time at which the finding or any refusal is made or given.

16. The High Court shall have power to extend the time for appealing, or to amend the grounds of appeal, or to make any other order, on such terms as the court shall think just, to ensure the determination on the merits of the real questions in controversy between the parties. **E**

• *Rodger Winn* for the appellant.

R. J. A. Temple for the respondent. **F**

LANGTON, J. : In this case, the husband comes to the court, as Mr. Winn has very fairly put it, as a suppliant. He is out of time—hopelessly out of time—in his appeal. He asks us nevertheless to hear his appeal and determine the matters in dispute between his wife and himself as being real questions in controversy in what has been a most unfortunate and most protracted piece of litigation. The hearing before the Croydon justices, in regard to which it is sought to bring an appeal, was on June 16, 1938. At that hearing, the original summons was for wilful neglect to maintain the wife. A further summons, in which it was alleged that the husband had deserted the wife, was served, and, by agreement, heard. **G**

The magistrates found desertion, and they found it upon a full hearing. After having heard both sides in the witness-box, they grounded their decision upon a letter from the wife, written on Mar. 27, in which she offered to resume cohabitation. That offer was refused, either expressly or tacitly, by the husband. The appeal from **H**

that finding was not entered until Jan. 6, 1939, so that more than 6 months had elapsed since the hearing of the summons. The time allowed for appeal is the not inconsiderable time of 21 days, and the two rules which I think are germane are R.S.C., Ord. 59, rr. 12, 16. By r. 12, which I need not read, a period of 21 days from the date of the judgment, order or finding

A is allowed. By r. 16, a very ample power is conferred upon the High Court to extend the time for appealing, or to make any other order, on such terms as the court may think just, to ensure the determination on merits of the real questions in controversy between the parties. It is within the ambit of that last rule that Mr. Winn urges us to act. Of

B the two strong grounds of the appeal which struck me, the first is that, during this period, and during the whole of this period, the husband has never been in default. If the wife had her order correctly, she has had her maintenance correctly during all that period. If she had it incorrectly, no harm was done, as far as she is concerned. She is so

C much the better off by having had weekly payments of maintenance to which she was not entitled. The second ground that struck me as having weight was that the husband, before the hearing of this summons at all, had stated to his solicitors that he wanted an appeal lodged. He is obviously a man who feels the charges made against him, and is not in-

D sensible to the disadvantages of being found guilty of deserting his wife, and he is a man who appears to be sincerely fond of his child. He undoubtedly went to court prepared to fight for what he believed to be his rights, and for the custody of his child. That is the strong ground—namely, that the wife has really suffered no prejudice. The matter

E has not rested there, because we have been invited to consider, and have considered, the correspondence which ensued between the husband and the wife after the order was made. We have been told of, and I think are now fully informed of, the mental processes of the husband after the order was made against him. At the time the order was made, he

F appears to have been in rather poor health. He had a holiday in Switzerland immediately afterwards, and it seems fair to infer that by that vacation his health was restored to a certain extent. Be that as it may, he had full assistance of a legal character. He had solicitors to help him, and counsel at the hearing. He had the benefit of their advice and assis-

G tance after the hearing was concluded. I think that there is no doubt at all now that his determination, which was quite fixed and clear, and which was reached with every advantage, was that it would be both unwise and unnecessary to appeal. The correspondence bears that out in every particular. It is quite clear to me that that correspondence shows that

H Mr. Finding, who is a man of no small determination, had made up his mind to approach his wife upon quite different lines from those embodied in any appeal from the finding of the justices. In the correspondence, he repeatedly returns to the attack, and seeks to found a position in which he would have a strong case before the magistrates by showing that he was not a deserter at all, and that he had, in fact, offered his wife a

suitable home. On Sept. 26, he puts the matter in quite unambiguous language :

Dear Lillie, It will not come as a surprise to you to hear that I am now engaged in finding a suitable home from which to offer you cohabitation. You have no doubt been advised that I am legally entitled to do this and in the event of your refusal to come ask for the order against me as a technical deserter to be cancelled.

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It was a surprise to me to hear that counsel so able and experienced as Mr. Winn could possibly have construed that correspondence in any sense other than that it was translucently evident, as it appeared to me, that Mr. Finding had determined to checkmate his wife by taking the line of offering her cohabitation.

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I have to deal with this 6-months' interval, and it will be observed that from Sept. 26, a full 3 months of the time that had elapsed, by which the appellant was out of time, was occupied in this campaign, quite a legitimate campaign, upon his part, to endeavour to get his wife to return to him. Thereafter, Mr. Finding having, as I gather, changed his legal advisers, the matter was being reconsidered by a busy legal adviser. For my part, I should be loath to take this period of these last three months as tending very much against him. The real point is whether or not there is anything on which we can say, or on which we ought to say, that this husband should be relieved from the position to which he has introduced himself technically—namely, that of being, not a little, not merely a certain amount, but a very great deal out of time. In this connection, HENN COLLINS, J., has handed to me a case which gives some assistance and guidance, though I would be the last to pretend that in any of this class of litigation there is any binding principle which should be laid down and followed. The case is *Re Manchester Economic Building Society* (1), and it was a case of the same character, where leave to appeal was sought notwithstanding the lapse of time which put the appellant technically out of court. In dealing with the matter, COTTON, L.J., says, at p. 499 :

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This, I think, may be laid down, that when the rules and the Act of Parliament say that an appeal is to be within a certain time unless special leave shall be given by the Court of Appeal to appeal after that time, the court does not grant leave unless there is something which in the opinion of the court entitles the person who applies for extension of time to be relieved against the bar established by the orders and the Act of Parliament. It has been called an equity, but that is not a proper term ; it is something which entitles him to ask for the indulgence of the court, to ask to be relieved from the legal bar that there is in the orders and Act of Parliament.

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G

The court should not lose sight of the fact that, when the time for appeal has run out, and run out without any kind of protest on the part of the would-be appellant, the respondent has a certain accrued right. As Mr. Winn has properly pointed out, that accrued right is not permanent, H or of a character which cannot, and should not, at the time be ignored. The length of the period of time elapsed is a matter of degree only. In this case, I am at a loss to see in any act on the part of the appellant anything which could possibly come within the words that COTTON, L.J., uses here. What is there that entitles the appellant to ask for this very

considerable indulgence as against the wife's accrued right to immunity from an appeal? I can see really nothing at all. Frequently we have in this court cases where lack of means is really at the bottom of the lapse of time between the allotted time for appeal and the actual time of the appeal. I am glad to think that we are all exceedingly indulgent in that regard. We have had an opportunity of being indulgent already to-day. There are other cases in which ignorance of the would-be appellant is the real cause of the delay. Again, it is very right and proper that the court should be indulgent to an ignorance which, when the matter is properly regarded, is not a very culpable form of ignorance, since it is ignorance of what is to a large extent a technicality. Then again we have cases in which, although the parties are not ignorant, there is some genuine misunderstanding arising in the minds of the appellants—a genuine misunderstanding either of the attitude of the other side or perhaps of some difficult, intricate questions of law. These again are instances where the court, it seems to me, is right to be indulgent. They are the kind of thing which I imagine is envisaged by COTTON, L.J., when he talks of something that entitles the appellant—though strictly, of course, in law he is not so entitled—to the indulgence of the court, and, where, as in the present case, no real harm can be done to the other side—the respondent—by granting sympathy and indulgence, it is right that the court should extend that sympathy and indulgence. Here there is no question of ignorance and misunderstanding. The appellant, being fully advised, elected to take a course different from that which was open to him by way of appeal. His different course has not come to fruition in the manner in which, it may be, he quite genuinely hoped and desired that it would, and now he says: "Having failed upon my first ground, I would like to try another one." In my judgment, that gives him no right or title to the sympathy or indulgence of this court.

HENN COLLINS, J.: I agree. I only desire to add this to what LANGTON, J., has said. We are asked by the appellant to extend an indulgence to him. The court can do that only on settled principles, the chief of which is that it has an absolute discretion in the matter. That discretion must be exercised judicially, and, having regard to certain not very sharply defined principles—necessarily not sharply defined, inasmuch as one is dealing with a question of discretion, which must vary with every case. As was pointed out by COTTON, L.J., in the passage which LANGTON, J., has read, one who asks the court to grant him that indulgence must show something which entitles him to the exercise of it. That something is, as a rule, either lack of means, mistake, or accident. Those are only instances, and certainly they do not constitute an exhaustive list. They are by far the commonest, however. Certainly the appellant in this case comes under none of those heads. Regarding the delay for which he himself was responsible, it amounted

to 3 months. What was he doing during those 3 months? He was faced, it seems to me, with this position. He had been found by the court of summary jurisdiction to be in desertion. He could put an end to the result of that finding in either of two ways, (i) by appeal, or (ii) by so setting things in motion that a state of things arose in which he could go back to the court and say: "The position is now altered. It is my wife who is deserting me." He chose the latter alternative, and he occupied himself for those 3 months in getting his tackle in order. In the result, either he has succeeded in that or he has failed. I am expressing no opinion at all as to what the present position is. What does concern me is that the delay which he wants us to abridge did not occur by reason of any lack of means, mistake or accident, or for any other reason except the reason that he sought to put an end to his obligations, or to the existing state of desertion by him, by means other than appeal. Whether he has succeeded is another matter. I am satisfied that this court ought not to grant the indulgence.

Leave to appeal refused.

Solicitors: *Appelbe & Morrison* (for the appellant); *Harding & Co.* (for the respondent).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

GUERARD v. MAURITIUS GOVERNMENT.

[PRIVY COUNCIL (Lord Thankerton, Lord Romer and Lord Porter),
January 17, 19, February 10, 1939.]

Privy Council—Mauritius—Public authorities—Colonial government—Liability on debenture—Contract or tort—Petition of right.

In 1929, the Receiver-General of Mauritius caused to be issued a series of debentures charged upon the general revenues and assets of the colony, the issue being authorised by the Sugar Industry Loan Ordinance No. 14 of 1929. Of the debentures so issued, 37 debentures for Rs. 1,000 each stood registered in the name of the appellant upon July 4, 1934. Each debenture stated that the issue was authorised by the ordinance and that provision for its redemption was prescribed therein. The provisions of the ordinance enabled a holder of the debentures, which were originally payable to bearer, to convert them into debentures payable to a registered holder, and also provided for their reconversion into bearer debentures upon the application of the holder. Between July, 1934, and Jan., 1935, the Receiver-General, purporting to act in pursuance of the proviso contained in sect. 6 of the ordinance, converted the appellant's debentures into debentures payable to bearer. The conversions were effected upon the application of one Herchenroder, who had no authority from the appellant to make any such application, and subsequently he pledged, or otherwise disposed of, the whole of the appellant's debentures. The appellant filed a petition of right, alleging that the government had no right to effect the conversions, that, acting upon Herchenroder's illegal dealings with the debentures, the government refused to acknowledge its indebtedness to the appellant, and that the government had committed a breach of its contract with the appellant, enumerated on the debentures or in the ordinance. The government contended that the only contractual obligations resulting

from the debentures issued under the authority of the ordinance were those enumerated in the debentures themselves, and that therefore it would follow that the conversion of the debentures was not a breach of the appellant's contract with the government, but was merely a tort on the part of the Receiver-General, in respect of which the government could not be made liable :—

A HELD : (i) the appellant's claim against the government, so far as it was based upon the repudiation of all liability to her under her debentures after their wrongful reconversion into bearer debentures, was a claim founded solely upon alleged breaches of contract between the government and the appellant.

B (ii) the provision for redemption contained in the ordinance was an essential term of the contract relating to a secured debt, and the fact that, in order to ascertain the terms of redemption, the debenture holder was, by the debenture, expressly referred to the ordinance pointed to the conclusion that the relevant sections of the ordinance formed an essential part of the contract between the government and the debenture holder.

C **[EDITORIAL NOTE.** In enforcing the debenture, the debenture holder is enforcing a contract of loan between the parties, and the action is, therefore, based on contract. It was contended here that the duties of the official were defined solely by the terms of the debenture, but this contention was held to be untenable, as the debenture itself made reference to the enactment of the legislature. In a petition of right, a claim based on tort must, of course, fail.

D AS TO ENFORCEMENT OF DEBENTURES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 513, 514, para. 830 ; and FOR CASES, see DIGEST, Vol. 10, p. 793, Nos. 4984-4986.]

Cases referred to :

- (1) *Barton v. North Staffordshire Ry. Co.* (1888), 38 Ch.D. 458 ; 32 Digest 515, 1735 ; 57 L.J.Ch. 800 ; 58 L.T. 549.
- (2) *Lovibond v. Grand Trunk Ry. Co. of Canada*, [1936] 2 All E.R. 495 ; Digest Supp.
- E** (3) *Guttsell v. Reeve*, [1936] 1 K.B. 272 ; Digest Supp. ; 105 L.J.K.B. 213 ; 154 L.T. 1.
- (4) *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399 ; Digest Supp. ; 105 L.J.K.B. 309 ; 154 L.T. 365.

F APPEAL from a judgment of the Full Bench of the Supreme Court of Mauritius (NAIRAC, C.J., LE CONTE and ESPITALIER NOEL, JJ.), dated Sept. 2, 1937, non-suiting the appellant as suppliant in a petition of right presented by her against the respondent. The judgment of their Lordships was delivered by LORD ROMER.

Charles L. Henderson and *P. A. Picarda* for the appellant.

G *The Solicitor-General (Sir Terence O'Connor, K.C.)* and *Kenelm Preedy* for the respondent.

H *Henderson* : The obligations imposed by the ordinance, and particularly those imposed by arts. 6 and 7 thereof, are part of the contract of loan between the appellant and the respondent evidenced by the debentures. The respondent had no right or power to remove the name of the appellant from the register as the holder of registered debentures except upon an application duly made and satisfying the requirements of the ordinance, and, in so doing, and in refusing to recognise her as the holder of the debentures, it has repudiated its debt to her, and has thereby committed a breach of its contract with her. The facts constitute a breach of

contract, or *faute contractuelle*, on the part of the respondent, and it is irrelevant to consider whether or not those same facts constitute a *faute délictuelle*, or tort. [Counsel referred to *Barton v. North Staffordshire Ry. Co.* (1) and *Lovibond v. Grand Trunk Ry. Co. of Canada* (2).]

Picarda followed on the same side.

The Solicitor-General : The only contract between the colonial government and the debenture holders was that expressed in the debentures themselves, and no breach of such contract was alleged by the appellant. Art. 6 of the ordinance imposed upon the colonial government no contractual duty towards the debenture holders, and, even if it did do so, it would only be a duty to provide the facilities for transfer and conversion of the debentures which are specified in that article. According to the Code Napoleon, the same facts cannot constitute both a *faute délictuelle* and a *faute contractuelle*, and the facts of the present case, if established, would constitute a *faute délictuelle*. In entertaining the application made by Herchenroder, the Receiver-General acted in breach of his duty to the colonial government, and outside the scope of the authority conferred on him by the ordinance. [Counsel referred to *Gutsell v. Reeve* (3) and *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* (4).]

Henderson in reply.

LORD ROMER : This is an appeal from a judgment of the Supreme Court of Mauritius, dated Sept. 2, 1937, non-suiting the appellant as suppliant in a petition of right presented by her against the respondent, the colonial government of Mauritius. In its statement of defence to the petition, the respondent contended *in limine litis* that, even assuming for the sake of argument that all the facts disclosed and averments made in the petition were true, which the respondent in fact denied, those facts and averments only disclosed a tort, or *faute délictuelle*, on the part of an officer of the Treasury. It is admitted by the appellant that, if this contention should succeed, her petition must necessarily fail, inasmuch as no action in tort lies against the colonial government. In these circumstances, both parties requested the Supreme Court to decide the preliminary issue thus raised upon the assumption that all the allegations of fact contained in the petition could eventually be proved. The Supreme Court acceded to such request, and the point was in due course argued before them. In the result, it was decided in favour of the government, and the appellant was non-suited, with costs. It is from that decision that, with the leave of the Supreme Court, this appeal is now brought before His Majesty in Council. However, in view of the circumstances above stated, the facts which give rise to the appeal, and which must now be set forth, will necessarily include many facts the truth of which has not been established, but which are merely assumed to be true for the purposes of the appeal.

In or about Sept., 1929, the Receiver-General of Mauritius caused to be issued a series of debentures charged upon the general revenues

and assets of the colony, such issue being authorised by the Sugar Industry Loan Ordinance No. 14 of 1929. Inasmuch as one of the questions to be decided upon this appeal is the question whether or not any, and, if so, which, of the provisions of the ordinance are to be regarded as being incorporated in, and forming part of, the contract
A between the government and the debenture holders, it is necessary to set out in full as much of those provisions as is material for the purpose :

2. (1) It shall be lawful for the governor for and on behalf of the colony to raise upon debentures, as provided by this ordinance, a loan of Rs. 3,300,000 . . .

(2) Such debentures shall be reimbursed in 30 years provided that it shall be lawful for the governor after 20 years to order that all or such of them as shall be drawn by lot in such manner as the governor in executive council shall determine be reimbursed on such day as the governor shall fix and cause to be notified in the Gazette.
B

3. (1) Every debenture shall be for the sum of Rs. 100, Rs. 500, Rs. 1,000, Rs. 5,000 or Rs. 10,000 payable to bearer or to any person in whose name the debenture has been issued and shall bear interest at a rate not exceeding 5 per cent. per annum payable half-yearly. Every debenture shall be secured upon the general revenues and assets of the colony. (2) Every debenture shall be signed on behalf of the colony by the Receiver-General.
C

4. Every debenture shall bear a printed consecutive number and, before being issued, shall be registered in register books to be kept for that purpose in the office of the Receiver-General.

5. To every debenture there shall be attached at the time of the issue thereof coupons for the payment of the interest to become due in each half-year upon the principal sum secured by the debenture.

6. It shall be lawful for the Receiver-General upon the application of the holder of a debenture payable to bearer to register such debenture in the name of the holder in the books of the Receiver-General by means of an entry to be made in a register kept for that purpose. Such entry shall state the nature of the application, its date, the name of the holder, and the number of the debenture. Each entry shall be signed by the holder and by the Receiver-General or Assistant Receiver-General, and mention of the debenture having been registered shall be inscribed on the back thereof and signed as above.
D

The debenture thus registered shall be transferable only by means of an assignment to be entered in a register and to be signed by the transferor and the transferee, or by the holders of their power of attorney, and by the Receiver-General or Assistant Receiver-General: mention of the transfer shall be indorsed on the debenture and signed as above, and the transferee shall thereby become entitled to receive the principal moneys and interest respectively, secured or represented by the debenture and the coupons attached thereto. Provided that any debenture in a holder's name may be converted into a debenture payable to bearer. Such conversion shall be effected by means of an entry in the aforementioned manner.
E

8. The interest upon the principal moneys secured by each debenture shall commence at and from a day to be named in that behalf in the debenture and shall be paid in the office of the Receiver-General half-yearly on the days to be named in that behalf in the debenture.
F

9. On the day fixed for the repayment of the debentures or of such of them as may have been drawn by lot as hereinbefore enacted, the Receiver-General shall, on demand, pay to the holders of the debentures the principal moneys secured by the debentures with all interest due or payable thereon up to that day.
G

10. From and after the day fixed as aforesaid for the repayment of the debentures, all interest on the principal moneys secured by the debentures shall cease and determine whether payment of the principal shall have been demanded or not.

11. Upon payment of the principal moneys secured by any debenture, such debenture with all the coupons thereto belonging shall be delivered to the Receiver-General forthwith who shall cancel the same.
H

12. In case any debenture issued under this ordinance is by accident defaced, it shall be lawful for the governor to cause a new debenture to be made and delivered to the bearer and cause the defaced debenture to be cancelled. The new debenture shall bear the same interest and be subject to the same rules as the original debenture.

13. The governor, on proof to his satisfaction that any debenture issued under this ordinance has by accident been lost or destroyed before the same has been paid off, may, if the number and amount of such debenture are ascertained, and on due security being given, to his satisfaction, for indemnifying the colonial govern-

ment for any loss to which the said government may at any time be subjected by reason thereof, issue a new debenture corresponding in all respects with the debenture so lost or destroyed ; or, if any debenture when so lost or destroyed is overdue, the governor may cause the money due thereupon to be paid off and discharged on security being given as above.

15. From the date of issue of the debentures, contributions to a sinking fund shall be made out of the general revenues and assets of the colony. Such contributions shall be remitted to the Crown Agents to be invested in the names of trustees to be appointed by the Secretary of State. The trustees shall also invest the dividends, interests or proceeds arising from such investment, so that the same may accumulate by way of compound interest and be applied towards the final extinction of the debt.

16. All sums paid to the account of such sinking fund and the interest thereon shall be invested in such securities as may be approved by the Secretary of State.

17. In case the sinking fund shall be insufficient to provide the necessary funds for the redemption of the debentures when they shall have become due, the deficiency shall be made good out of the general revenues and assets of the colony.

The debentures themselves were all in the following form :

MAURITIUS : THE SUGAR INDUSTRY LOAN, 1949-59.

AUTHORISED BY ORDINANCE No. 14 OF 1929.

The governor of Mauritius is authorised by the Sugar Industry Loan Ordinance No. 14 of 1929 to cause this debenture to be issued, and the general revenues and assets of the colony to secure, in accordance with the provisions of the above ordinance, the payment of the capital sum of this debenture with the interest accruing thereon, and due provision for the redemption of the debenture is prescribed by the said ordinance.

Series..... No..... Rs.....
The undersigned, the Receiver-General of Mauritius, for and on behalf of the said colony, does hereby acknowledge that the colony of Mauritius is indebted unto or the bearer of the present debenture in the sum of RUPEES..... repayable in 30 years, provided that it shall be lawful for the governor, after 20 years, to order that such debenture, as shall be drawn by lot in such manner as the governor in executive council shall determine, be reimbursed on such day as the governor shall fix and cause to be notified in the Gazette. From and after the day appointed for the repayment of any so drawn debenture, all interest on principal moneys secured by the said debenture shall cease ; and upon payment of the principal moneys secured by any debenture, such debenture with all the coupons thereto attached shall be delivered to the Receiver-General.

The general revenues and assets of the colony are pledged as security under the provisions of the Sugar Industry Loan Ordinance No. 14 of 1929.

The said sum shall bear interest at the rate of 5 per cent. per annum payable on Mar. 10 and Sept. 10, the first payment to be made on Mar. 10, 1930.

Given under my hand, at the Treasury, Port Louis, on Sept. 10, 1929.

Receiver-General.

Sixty coupons were attached to each debenture, and they were in the following form :

THE SUGAR INDUSTRY LOAN
Ord. 14 of 1929
Six months interest due
Mar. 10, 1930.
On deb. for Rs. . . . payable at TREASURY
Receiver-General
The holder of this coupon is requested to deposit it 3 clear days before payment for purpose of examination.

Of the debentures so issued, 37 debentures for Rs. 1,000 each stood registered in the name of the appellant upon July 4, 1934. Their Lordships have no information as to the history of these debentures before

that date, but it is plain that originally they must have been in the form set out above—that is to say, debentures payable to bearer—and that they were subsequently converted into debentures payable to the registered holder in pursuance of the power conferred upon the Receiver-General by sect. 6 of the ordinance. On July 4, 1934, the Receiver-

- A** General, purporting to act in pursuance of the proviso to the section, converted 25 of the appellant's debentures into debentures to bearer. He similarly converted 7 more on Sept. 25, 1934, and the remaining 5 on Jan. 24, 1935. All these conversions were effected upon the application of one Bernard Herchenroder, who had no authority from
- B** the appellant to make any such application or to make use of her debentures for that purpose. Thereafter, in fraud of the appellant, Herchenroder pledged or otherwise disposed of the whole of the 37 debentures. In the result, the appellant has received no interest upon her debentures since the conversions, and the respondent claims that its indebtedness
- C** to the appellant under each debenture ceased as from the date of the debenture's conversion. In these circumstances, the appellant filed her petition of right. In such petition, she alleged that the colonial government had no right to effect the conversion, that, acting upon Herchenroder's illegal dealings with the debentures, the government
- D** refused to acknowledge its indebtedness to the appellant, and that by acting as aforesaid the government had committed a breach of its contract with the appellant :

... which said contract was a contract in respect of a loan to be reimbursed in 30 years under the conditions enumerated on the said debentures and in the ordinance.

- E**
- It would appear from this that the appellant was charging the government with 3 alleged breaches of contract—namely, (i) the wrongful conversion of her debentures into bearer debentures, (ii) its failure to pay her the accrued interest on the debentures and (iii) its repudiation
- F** of all other liability to her under the debentures. The government by its statement of defence contended that the only contractual obligations resulting from the debentures issued under the authority of the ordinance were those enumerated in the debentures themselves. If this contention should prevail, the conversion of the appellant's debentures would not
- G** be a breach of her contract with the government, but would be merely a tort on the part of the Receiver-General, in respect of which the government could not be made liable. However, in order to establish the alleged breaches of contract numbered (ii) and (iii) above, it is in no way incumbent upon the appellant to show that the provisions contained
- H** in sect. 6 of the ordinance form part of the contract between herself and the government, for until the unauthorised conversion she was the registered holder of the debentures, and, as such, was the person to whom the government was under a contractual obligation to pay the principal sum secured when it should fall due. This contractual obligation was contained in the debentures themselves, inasmuch as the fact that,

they had been registered had been recorded on the back of them, in accordance with the provision in that behalf contained in sect. 6 of the ordinance. None of the debentures was produced to their Lordships, nor have their Lordships been furnished with a copy of the indorsement upon them, but it is plain that the effect of the mention on the back of a debenture of the fact that it had been registered was to convert the contract contained in the debenture to pay the bearer into a contract to pay the registered holder. The government contends that, by means of the conversion of the debentures, it has been released from this obligation. It must, therefore, in the words of art. 1315 of the French Civil Code :

. . . prove payment or the fact which has caused the obligation to be wiped out.

It is not suggested, of course, in the present case, that there has been payment of the principal sum secured by the appellant's debentures, and, unless the government can justify the conversion, its repudiation of liability to her in respect of that sum entitles the appellant at once to sue the government for damages in respect of breach of contract.

These observations would seem to be equally applicable to the failure to pay the interest accrued under the debentures. While the debentures were bearer debentures, the interest was no doubt payable from time to time to the bearer of the relative coupon, but, after conversion into a registered debenture, the interest was payable to the registered holder alone, for the only obligation to pay interest expressed in the debenture is that created by the words :

The said sum shall bear interest at the rate of 5 per cent. per annum payable on Mar. 10 and Sept. 10, the first payment to be made on Mar. 10, 1930.

The interest would, therefore, be payable *prima facie* to the person to whom the principal money was payable, that person after conversion being the registered holder, and, though it is possible that this *prima facie* construction would not have prevailed had the interest coupons been expressed to be payable to bearer, such is not the case. It is no doubt stated in each coupon that the holder of it is requested to deposit it 3 clear days before payment for the purpose of examination, but, after indorsement on the debenture of mention of the debenture having been registered, the whole debenture, including the coupons, must be construed in the light of this fact, and there would be nothing on the coupon when so construed to suggest that the holder of the coupon might be someone other than the registered holder of the debenture. For these reasons, their Lordships are of opinion that the appellant's claim against the government, so far as it was based upon its repudiation of all liability to her under her debentures after their wrongful reconversion into bearer debentures, was a claim founded solely upon alleged breaches of contract, and that the appellant should not have been non-suited.

This view of the matter was not, unfortunately, the one that was presented by the appellant when her case was before the Supreme Court.

Upon that occasion, her only contention appears to have been that the government committed a breach of its contract with her by reason of the unauthorised conversion by the Receiver-General of her registered debentures into debentures payable to bearer. The only question, therefore, that was argued and decided was the question whether the provisions of sect. 6 of the Ordinance No. 14 of 1929 form part of the contract between the appellant and the government. In view of the conclusion, already expressed, at which their Lordships have arrived, it is not in strictness necessary to decide this question, but, at the trial of the petition which must now take place, it may be urged on the part of the government that the appellant has not suffered any damage by reason of its repudiation of all liability to her under her debentures, inasmuch as she could never call upon the government to pay either the principal or the interest secured by the debentures except on delivery up of the debentures or coupons, as the case may be, and that her inability to do this will have been caused, not by any breach of contract on the part of the government, but by a tort, or *faute délictuelle*, on the part of the Receiver-General, for which the government cannot be made responsible. Whether this contention would be sound, assuming that the unauthorised conversion of the debentures was merely a tort, and not a breach of contract, is not a matter upon which their Lordships need express any opinion, for, with all respect to the Supreme Court, their Lordships are of opinion that the unauthorised conversion, if proved, was a breach of the contract between the government and the appellant. Their reasons for arriving at this conclusion are as follow.

Each debenture states that the governor of Mauritius is authorised by the Sugar Industry Loan Ordinance No. 14 of 1929 to cause the debenture to be issued, and that the general revenues and assets of the colony secure the payment of the capital sum of the debenture, with the interest accruing, in accordance with the provisions of that ordinance. It states that due provision for the redemption of the debenture is prescribed by the ordinance, and it further adds that the general revenues and assets of the colony are pledged as security under the provisions of the ordinance. Nothing further is said in the debenture itself either as to the manner in which the charge on the general revenues and assets is to be constituted or as to how such revenues and assets are to be made available for payment of the debenture. Nor is anything said about the redemption of the debenture, except that due provision for its redemption is prescribed by the ordinance. However, the terms on which the security is constituted and may be given effect to and the terms upon which the security may be redeemed are essential terms of every contract relating to a secured debt, and the fact that, in order to ascertain these terms, the debenture holder is by the debenture expressly referred to the ordinance inevitably, in their Lordships' opinion, points to the conclusion that sects. 9, 10 and 11 of the ordinance, which deal with the redemption of the debentures, and sects. 15, 16 and 17, which deal with the con-

stitution of the security for the debentures, form part, and an essential part, of the contract between the government and the debenture holder. Their Lordships are, therefore, unable to agree with the Supreme Court in holding that the ordinance does no more than create administrative powers and duties which government officials have to perform, and that its provisions cannot in any way form part of the contractual obligations of the government towards the debenture holders. This is no doubt true of some of its provisions, but it is not true of the provisions contained in the 6 sections just mentioned, and, in their Lordships' opinion, it is not true of the provisions contained in sect. 6. The contract contained in the debenture itself is a contract to pay the bearer. Upon its conversion into a registered debenture, that contract, as already pointed out, became a contract to pay the registered holder, but it only became so by virtue of the mention, indorsed upon the debenture, that it had been registered. In order to ascertain what results flowed from such registration, the debenture holder would necessarily have to refer to sect. 6 of the ordinance. All the terms of the contract with the registered holder are not, therefore, to be found in the debenture. A transferee from the registered holder, for instance, desiring to enforce his debenture, could not succeed on mere production of the debenture. He would have to prove a transfer to himself, and a registration of his transfer made in accordance with the provisions in that behalf contained in sect. 6, and the contract between himself and the government which he would be seeking to enforce would be a contract arising partly under that section and partly under the debenture, indorsed with mention of the fact that it had been registered. That indorsement must necessarily mean that it had been registered under sect. 6 of the ordinance, even if it did not specifically refer to that section. For these reasons, their Lordships are of opinion that the order of the Supreme Court of Sept. 2, 1937, non-suiting the appellant with costs, should be discharged, and that the appeal should be allowed, with costs here and below. They will humbly advise His Majesty accordingly. Their Lordships desire to add that they express no opinion as to the precise nature of the relief to which the appellant is entitled should she succeed upon the hearing of her petition.

Appeal allowed, with costs in both courts.

Solicitors : *Lethbridge, Money & Prior* (for the appellant) ; *Burchells* (for the respondent).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

NORREYS v. ZEFFERT.

[KING'S BENCH DIVISION (Atkinson, J.), March 28, 1939.]

Gaming—Recovery of winnings—New consideration—Forbearing to report to Tattersalls—Reporting to trade protection societies and social club—Threat—Distinction between promise to pay and promise to make a proposal to pay.

The defendant, being unable to pay money owing on certain bets, was interviewed with the object of obtaining from him a promise to pay made for good consideration. In addition to the usual suggestion of reporting the matter to Tattersalls, it was also suggested that trade protection societies, and finally that the defendant's social club, would be notified of his default. The defendant stated that he had not the means to pay, but that he was expecting an improvement in his financial position, and, if he was given a further interview about a month later, he would then make a proposal for payment within 3 months :—

Held : at the highest, the statement of the defendant was a mere expression of hope of being able to pay, and not a promise to pay within the decision in *Hyams v. Stuart King* (1).

Semble : If the statement amounted to a promise to pay, that promise was obtained by means of a threat, and was one which the courts would not enforce.

EDITORIAL NOTE. It has been said that the doctrine of *Hyams v. Stuart King* is one that ought not to be extended, and, though the courts have not sought to overrule the decision in that case, there has certainly been a tendency to confine the doctrine within the narrowest limits. The present case is important, since, although the judge did not have to decide the point, he has expressed a definite view of the bearing of the decision of the House of Lords in *Thorne v. Motor Trade Association* (2) upon this question. A threat to take a step in lawful furtherance of the creditor's business interests may be permissible, but a threat merely to injure the party threatened is not. Refraining from carrying out the former class of threat may be a good consideration for a promise to pay, but refraining from carrying out the latter is not.

AS TO PROMISE TO PAY GAMING DEBT, see HALSBURY, Hailsham Edn., Vol. 15, pp. 476, 477, para. 873 ; and FOR CASES, see DIGEST, Vol. 25, pp. 400-403, Nos. 54-70.]

F Cases referred to :

- (1) *Hyams v. Stuart King*, [1908] 2 K.B. 696 ; 25 Digest 401, 58 ; 77 L.J.K.B. 794 ; 99 L.T. 424.
- (2) *Thorne v. Motor Trade Assocn.*, [1937] A.C. 797 ; [1937] 3 All E.R. 157 ; Digest Supp. ; 106 L.J.K.B. 495 ; 157 L.T. 399.
- (3) *Burden v. Harris*, [1937] 4 All E.R. 559 ; Digest Supp.
- (4) *Poteliakhoff v. Teakle*, [1938] 2 K.B. 816 ; [1938] 3 All E.R. 686 ; Digest Supp. ; 107 L.J.K.B. 678.
- (5) *Hyams v. Coombes* (1912), 28 T.L.R. 413 ; 25 Digest 403, 70.

ACTION to recover the sum of £221 7s. 10d., admitted to be owing to the plaintiff, but owing in respect of bets on racehorses. The defendant

H relied on the Gaming Act, 1845, s. 18.

B. M. Cloutman for the plaintiff.

Seymour Collins for the defendant.

ATKINSON, J. : This action purports to be founded on an agreement made on June 24, 1938, which, it is said, shows that there was a promise

to pay made for good consideration, and brings the case within the principle of *Hyams v. Stuart King* (1). The plaintiff, being unable to obtain payment, put the matter in the hands of the National Turf Protection Society, and an agreement is said to have been made with Mr. Carpenter, the secretary of the society. Unfortunately, Mr. Carpenter had neglected to bring with him a copy of the rules of the society, but I gathered from him that the main object of the society is the recovery of bets due to bookmakers. The procedure is simple. Mr. Carpenter sees the debtor and tries to get either the money or a promise to pay which would support a legal claim. Threat after threat is made, until the resistance of the debtor is broken down, and he promises to pay in order to avoid some threatened consequence. Of course, *Hyams v. Stuart King* (1) is Mr. Carpenter's guiding star.

Mr. Carpenter's version of what happened on June 24 is as follows. He traced the defendant to his club. He saw him and told him his business, and began with the customary threat to report the defendant to Tattersalls. He explained that that meant not merely that the defendant would not be allowed to enter any of their enclosures, but also that Mr. Carpenter's society would notify 6,000 bookmakers throughout the country, and any moneys the defendant might win on other bets would be held up. This had no effect on the defendant, however. In fact, he owed other bookmakers money which he could not pay. He was in grave financial difficulties, and had no intention of betting again. Mr. Carpenter then went on to say that his society would notify the Football Pools Association, and that any winnings in the pools would also be jeopardised. Then Mr. Carpenter went on to say that the defendant's club would be notified. The club would be notified by his society, of course. There is no suggestion that Tattersalls would notify the club. Mr. Carpenter then dwelt upon what he called the stigma that would attach to him, and the effect such a stigma would have upon the defendant's friends. He went on to say that his society would notify the trade protection societies, and that any report made by any such society in future would contain a statement that the defendant had been warned off the turf, or something to that effect, for non-payment of bets. At last the defendant was aroused. He said that he thought that that was rather harsh, and that he did not want that to happen, but that even if Mr. Carpenter held a pistol at his head he could not pay, because he simply had not got the means. According to Mr. Carpenter, the defendant then said that he had some deals pending which would improve his position, and that he would see Mr. Carpenter about Aug. 1 with a proposal which would ensure payment within 3 months. That is the promise upon which this action is based.

Even if all this happened, and if such a promise was obtained, a serious question arises as to whether or not a promise so obtained is one which the court will enforce. There has been a good deal of difference of opinion as to how far agreements to pay money obtained by threats

are enforceable. The cases, and particularly, I think, *Thorne v. Motor Trade Asscn.* (2), seem to establish the proposition that, if the threat is a threat to take a step in lawful furtherance of the creditor's business interests, the refraining from taking such step may be good consideration for a promise to pay money not otherwise recoverable, however seriously the person threatened would be injured by the carrying out of the threat. On the other hand, if the threat is only an injuring threat, in order to induce payment of money, the refraining from carrying out the threat will not in general be good consideration for a promise to pay. The mere fact that a person may have a legal right to do something which will injure another is not sufficient justification for the demand of money as the price of not doing it. The opinion of SCRUTTON, L.J., to the contrary was expressly dissented from by the House of Lords in *Thorne v. Motor Trade Asscn.* (2), where LORD ATKIN said, at pp. 806, 807 ([1937] 3 All E.R. at p. 160) :

... the mere fact that the threat is to do something a person is entitled to do either causes the threat not to be a "menace" within the Larceny Act, 1916, or in itself provides a reasonable or probable cause for the demand.

In the same case, LORD WRIGHT says, at pp. 817, 818 ([1937] 3 All E.R. at p. 167) :

I think the word "menace" is to be liberally construed, and not as limited to threats of violence but as including threats of any action detrimental to or unpleasant to the person addressed. . . . I think the jury should be directed by the judge that the respondent association had a legal right to put the person's name on the stop list, so long as they did so in order to promote the trade interests of the association and its members and not with intent to injure, and so long as the money, fine or penalty demanded was reasonable and not extortionate. In other words, the jury would have to answer the question suggested by LORD DUNEDIN, "Whether there was a conspiracy to injure or only a set of acts dictated by business interests."

Of course, there is no question of conspiracy here, but it merely illustrates, I think, the dividing line between legitimate business threats and threats which are not legitimate. It is true that in *Thorne's* case (2) the court was considering the matter in connection with the Larceny Act, 1916, s. 29, the section relating to threats in writing, but it would be strange if an oral agreement obtained by threats was good when a written agreement so obtained would be bad. Sect. 31 is, indeed, stronger than sect. 29.

It enacts that every person who with intent to extort money threatens to publish that any money was owing touching another shall be guilty of a misdemeanour. In my opinion, the threat to report to Tattersalls was a threat which the plaintiff, through Carpenter, was entitled to make, and a promise to refrain from thus reporting the defendant would be good consideration. It would be merely taking a step in accordance with the recognised practice of bringing the matter before an independent committee, and the plaintiff, through Carpenter, would in no way be responsible for the consequences which automatically followed any finding of the committee. I respectfully agree with the decision of LAWRENCE, J., in *Burden v. Harris* (3). That would seem to be the effect

of *Hyams v. Stuart King* (1). The point was not, perhaps, argued in that case in relation to the Larceny Act, but FARWELL, L.J., in *Hyams v. Stuart King* (1), said, at pp. 725, 726 :

So long as lost bets are regarded as debts of honour, I cannot bring myself to describe as blackmail the use by the man aggrieved of the ordinary means allowed by society to compel the loser to comply with the dictates of honour.

That seems to me to be really based upon the point that is made in *Thorne's* case (2)—namely, that, so long as a promise to pay is made in consideration of refraining from taking the recognised step, the recognised procedure, which exists for the protection of the interests of the creditor of this class, the agreement may be a good one. It certainly would be in accordance with the principle laid down in *Thorne's* case (2). Such a step is one primarily aimed at protecting and furthering the interests of bookmakers, but threats that the National Turf Protection Society would notify members of a social club and the trade protection societies are, in my view, threats to defame, which are threats to injure, and seem to me to come within that class of threats which, according to *Thorne's* case (2), the creditor is not entitled to make. They are aimed merely at injuring. As LORD ATKIN said, at p. 807 ([1937] 3 All E.R. at p. 160) :

He must no doubt be acting not for the mere purpose of putting money in [the plaintiff's] pocket, but for some legitimate purpose other than the mere acquisition of money.

I also note the final words of MACKINNON, L.J., in *Poteliakhoff v. Teakle* (4) at p. 825 ([1938] 3 All E.R. at p. 689) :

The principle in *Hyams v. Stuart King* (1) is not one which it is desirable to extend . . .

I have dealt with what seems to me to be the law as it was argued. I have no doubt that it is all *obiter*, because I am not satisfied that any contract was in fact made in this case. I accept the defendant's evidence that he told Mr. Carpenter that he could not pay, but that he was hoping for an improvement in the position, and that, if he found he could pay, he would get in touch with Mr. Carpenter again. I further accept that Mr. Carpenter suggested August, and that the defendant said that he could not make any definite promise, but that he would see Mr. Carpenter again then, and that, if Mr. Carpenter was not satisfied with that, Mr. Carpenter would have to go ahead.

It is clear from some of Mr. Carpenter's answers that the defendant was emphasising his inability to pay, and that the defendant could not honestly have made any definite promise. In cross-examination, Mr. Carpenter said :

I wanted something definite, but he said he would call at the beginning of August, and details could be arranged then. I endeavoured to get him to fix something there and then, but he said it was not possible at that moment.

How could it make any difference in August ?—He offered the payment of this sum in the months of August, September, and October. I asked him how he proposed to make the payment, weekly, fortnightly or monthly. He said that was a thing which he would have to find out according to the result of his financial affairs.

I suggest to you there was no definite arrangement about that, or any promise that any moneys would be paid?—Yes. He said he hoped to be in a position to pay.

A If he said that he hoped to be in a position to pay, even on Mr. Carpenter's admission, that answer seems to me to be far more consistent with the defendant's version that he was making it quite clear that he could not pay, and that he had no prospect of being enabled to pay. He merely hoped to do so, and he would see Mr. Carpenter in August if anything came of his hopes, in which case he might be able to make some proposition. If Mr. Carpenter was not content with what he was saying, he would have to go and do his worst.

B Naturally, the plaintiff relies on Mr. Carpenter's letter of June 25, which was pressed upon me. It is a letter which purports to confirm this agreement. I have seen Mr. Carpenter, and I have seen what an astute person he is. Of course, he is there to try to produce some record of an agreement which will hold water, and I do not for a moment suppose that he felt that there was anything wrong in overstating things. At any rate, there are two plain comments to make about that letter. It begins :
C

D As requested, we confirm the agreement then reached [a plain lie], which provides that your default shall not be further reported, and that you will be relieved from further pressure.

Of course, that is an entirely erroneous statement of what is said to be the consideration. The mere refraining from reporting to Tattersalls was refraining from carrying out a threat which had not moved the defendant at all. It was not that which produced any promise which was made. It does not state the alleged consideration at all. If that were the only consideration, it would be none, because it was something which did not appeal to the defendant in any way. It does not truly state the consideration, on Mr. Carpenter's own evidence. At any rate, I am satisfied that that letter turns into a definite promise what was a mere hope, and, having seen the defendant, I cannot understand why he did not reply to that letter. I think that he was telling the truth when he said that he did not think that it mattered.
E
F

G I want to refer to *Hyams v. Coombes* (5), where LUSH, J., laid down what has always been regarded, I think, as the guiding principle in these cases. He is reported, at p. 414, as having said :

The plaintiff must prove that when the alleged new promise was made there was an actual contracting mind in both parties to enter into a new and genuine bargain for real and substantial consideration.

H I doubt whether using the word "substantial" may not be going too far. As long as there is real consideration, I do not know that it is for the court to measure the extent of it.

and he must fail if he left it in doubt whether the parties had any real intention to enter into a valid contract. There must be an actual forbearance to exercise some legal right in consideration of the promise to pay. It was not enough to show that there had been a threat to expose, or that there had been a promise to pay : it must be shown that the parties intended to contract, and that the defendant

had in his mind that he was promising on account of a real consideration. That being so, there was in his view no contract in this case. . .

I think that those words govern this case. The plaintiff has failed to satisfy me that any contract was in fact made, or that the defendant ever had in his mind that he was making, or was understood to be making, a contract of any kind. Therefore, in my opinion, the plaintiff fails **A** in this case, and there must be judgment for the defendant with costs.

Judgment for the defendant with costs.

Solicitors : *Leslie Marrison* (for the plaintiff); *Amphlett & Co.* (for the defendant).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.] **B**

Re COOPER, LE NEVE FOSTER *v.* NATIONAL PROVINCIAL BANK, LTD. **C**

[CHANCERY DIVISION (Crossman, J.), **March 16, 17, 1939.**]

Wills—Secret trust—Revocation of will—Secret trust excepted from revocation—Sum subject to secret trust increased by later will—Increase not communicated to trustees—Failure of increased gift.

In Feb., 1938, the testator appointed F. and W. executors of his will, and made, *inter alia*, the following bequest: "I bequeath to the said F. and W. the sum of £5,000 . . . upon the trusts which I have already communicated to them with respect thereto." The testator communicated to F. and W. that that sum of £5,000 was to be held on protective trusts for the benefit of the last defendant during her lifetime. In Mar., 1938, the testator revoked that will, and thereby restored a will made by him in 1931, and provided as follows: "The sum of £5,000 bequeathed to my trustees in the will now cancelled is to be increased to £10,000 they knowing my wishes regarding this sum." It being admitted that the gift of £5,000 made by the will of Feb., 1938, was excepted from the cancellation of that will, the question arose whether there was a valid secret trust in respect of the additional £5,000 contained in the will of Mar., 1938. It was contended that, as the bequest of the additional £5,000 had not been communicated to the trustees, and as they did not become aware of it until after the testator's death, there was no valid trust in respect of the additional sum:— **D**

HELD: as there was no communication in respect of the additional sum of £5,000, no trust was created, and, although the testator may have intended to confer an additional benefit on the beneficiary, the additional gift failed. **E**

[EDITORIAL NOTE.] It is settled that, in order that a secret trust may be enforceable, the terms of the trust must be communicated to the trustee. Here the terms had been communicated in so far as the first gift of £5,000 was concerned, but that communication could not be extended to a second gift of £5,000, although that gift was in terms an extension of the former gift. **F**

AS TO COMMUNICATION OF SECRET TRUSTS, see HALSBURY, 1st. Edn., Vol. 28, Trusts, pp. 21, 22, paras. 34, 35; and FOR CASES, see DIGEST, Vol. 43, pp. 601, 602, Nos. 486-491.] **G**

Cases referred to :

- (1) *Re Keen, Evershed v. Griffiths*, [1937] Ch. 236; [1937] 1 All E.R. 452; Digest Supp.; 106 L.J.Ch. 177; 156 L.T. 207. **H**

(2) *Blackwell v. Blackwell*, [1929] A.C. 318; Digest Supp.; 98 L.J.Ch. 251; 140 L.T. 444.

ADJOURNED SUMMONS to determine, *inter alia*, whether there was a secret trust in respect of a certain gift. The facts are fully set out in the judgment.

- A Wilfrid M. Hunt for the first executor.
Hon. Charles Russell for the second executor.
J. V. Nesbitt for the widow and children of the testator.
B. F. Mendel for other relatives of the testator.
Roger W. Turnbull for the beneficiary under the secret trust.

B
CROSSMAN, J.: This is a very interesting but painful question, because, as LORD WRIGHT, M.R., said in *Re Keen, Evershed v. Griffiths* (1), it is always with reluctance that a court refuses to give effect to what it may think is the intention of the testator. However, the question I have to decide here is really, I think, a question depending upon the law as to secret trusts as laid down in *Blackwell v. Blackwell* (2).

C It arises in this way. The testator made a will on July 13, 1931. That will contained nothing which affects or relates to the particular bequest with which I am dealing now, but on Feb. 10, 1938, he made another will, which expressly revoked the previous will, and by cl. 6 of that second will the testator made the following bequest:

D I bequeath to the said Fermian Le Neve Foster [whom he had appointed an executor] and Frank Wilson [also appointed an executor] the sum of £5,000 free of duty upon the trusts which I have already communicated to them with respect thereto

E Before I go on to the later will, I will ascertain the evidence as regards that. The evidence is an affidavit of Mr. Swan:

I was one of the attesting witnesses to the testator's will dated Feb. 10, 1938 [the will containing the cl. 6 set out above] and I prepared that will on the testator's instructions. Before he executed that will the testator verbally communicated to the defendant Frank Wilson and myself the trusts on which he desired the £5,000 legacy bequeathed by cl. 6 of such will to be held. In order to record such trusts I made a memorandum setting them out and I made this on the same day. Such memorandum is now produced and shown to me . . . and correctly sets out what the testator said. I made out such memorandum simply for my own satisfaction. The testator made such statement to me as representing the plaintiff as the plaintiff happened at that date to be absent in France temporarily and during his absence I represented him. The plaintiff returned to London a few days later and I at once informed him of the contents of cl. 6 of the will and of the said trusts. The testator on Feb. 10, 1938, had asked me to inform the plaintiff on his return as to the said trusts.

G Then the memorandum which he made immediately after the verbal communication by the testator was to this effect:

H Before Major Colin Cooper signed his will bearing even date with this memorandum he communicated to Mr. Frank Wilson in my presence and to me as the duly authorised agent for Fermian Le Neve Foster the following trust in relation to the sum of £5,000 bequeathed to the said Frank Wilson and Fermian Le Neve Foster by cl. 6 of his will that is to say the said sum of £5,000 was to be held by the said Frank Wilson and Fermian Le Neve Foster for investment in securities authorised by law for the investment of trust funds with power to vary and the income thereof was to be held on protective trusts for the benefit of [the last defendant] during her lifetime and from and after her death the capital representing this settled fund was to fall into the residue of his estate.

That was the evidence as to what occurred at the time of the execution of this will on Feb. 10, 1938. Shortly afterwards, the testator went to Africa on a big-game shooting expedition. He was taken ill, and was brought down to a hospital in Kenya Colony, where, on Mar. 27, 1938, he made the following testamentary dispositions :

This is my last will and cancels the will I made about Feb. 8 or Feb. 9, 1938 [it is accepted generally that he is referring there to the will of Feb. 10, 1938], before leaving England and puts back in its complete form the previous will [it is generally accepted that that means the will of July 13, 1931] with the exception that my executors will be Fermian Foster and the National Provincial Bank and my bequests to Stapleton and Mann holds good. The sum of £5,000 bequeathed to my trustees in the will now cancelled is to be increased to £10,000 they knowing my wishes regarding this sum.

On the same day—namely, Sunday, Mar. 27, 1938—he made another short document, which has been proved, but which does not affect this present question. The testator died two days later, on Mar. 29, and, after proceedings in the Probate Division, the will of July 13, 1931, the will of Feb. 10, 1938, and the two documents executed on Mar. 27, 1938, were admitted to probate as representing the testator's will. I have to treat those four documents together as constituting his effective testamentary disposition.

The question which has now arisen is this. It is admitted that the gift of £5,000 made by the will of Feb. 10, 1938, has been excepted from the cancelling of that will and remains as if it were incorporated really in the will of 1931—there was no such provision in the will of 1931—and it is not disputed here by anybody that, so far as regards that gift of £5,000, it is an effective gift, because the trusts on which it was to be held by the trustees to whom it was bequeathed were communicated to the legatees in the lifetime of the testator—in fact before the execution of the will—and, therefore, in accordance with the principles which were in fact laid down and followed in *Blackwell v. Blackwell* (2) (to which I have already referred), those are good trusts, which can be enforced, and take effect. The question is whether the gift of the sum of £5,000 which the testator added to that by the first document, executed on Mar. 27, 1938, is also valid. For the purpose of arriving at a decision of that question, I have to consider the principle upon which the gift of £5,000 by the will of Feb. 10, 1938, is now held to be good. Looking at *Blackwell v. Blackwell* (2), a case in the House of Lords, I find that the main principle which is laid down is that communication of the purpose for which a legacy is given to a legatee, and acquiescence by the legatee in that purpose, or promise on his part to carry it out, are the essential matters which render valid a legacy made in this way, on what are known as secret trusts. VISCOUNT SUMNER says, at p. 339 :

It is communication of the purpose to the legatee, coupled with the acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trusts, as applied in this instance to trustees, who happen also to be legatees.

In fact the principle of *Blackwell v. Blackwell* (2) is that it is a matter of

trusts, and not a matter of testamentary disposition. It is a matter of whether or not there is a valid and effective trust, binding the legacy which has been given to the trustees. Really what was added to the law by *Blackwell v. Blackwell* (2), or what was an additional principle which had not before been recognised or accepted entirely, was that, if

A the legacy was given to the trustees expressly upon trusts of some sort, this applied in the same way as that in which it applied where the legacy was given without any disclosure of the trust at all. It has always been accepted, I think, that, where a legacy was given to a person without any expression of a trust, and that person at the same time was informed that

B he held it upon a trust, and he either expressly undertook to perform that trust or allowed the legacy to remain without saying he would not carry it out, that was a trust which the court could enforce. Since *Blackwell v. Blackwell* (2), the same principle applies even if the legacy is given to a trustee expressly upon a trust, so that in fact he could not get

C out of it even if he wished to do so. What I have to consider here, however, is whether or not in this document of Mar. 27, 1938, the further £5,000 which is bequeathed (because I regard the gift here as an additional £5,000 bequeathed to the same trustees) can be governed by the same principles as those governing the original £5,000, notwithstanding the

D facts that the bequest of the second £5,000 was not communicated to the trustees and that in fact they were not aware of it until after the death of the testator. It seems to me that I must treat this gift in that document of Mar. 27, 1938, as an additional sum of £5,000, and at present, with the best will in the world, I cannot see how I can arrive at the

E conclusion that the trustees ever accepted a trust, either impliedly or expressly, with regard to the second £5,000. What they did, as the evidence clearly shows, is this. They accepted the trust as regards the first £5,000, and it seems to me that the suggestion which Mr. Nesbitt has put before me—namely, that, in the same way, instead of the £5,000,

F the whole of the residuary estate might have been given, and that, if the gift of the second £5,000 is held to be good, also a gift of the whole of the estate would be equally good—is a *reductio ad absurdum*, which does show that this does not come within the principle which, as extended in *Blackwell v. Blackwell* (2), I must now regard as the law binding me.

G It may be that the testator wished and intended to give that second sum in this way, but the question is whether he can give it in this way. He has chosen to give it on what is known as a secret trust, and the limit of the extent to which a secret trust can be enforced is at present shown by *Blackwell v. Blackwell* (2). I do not find in that case anything which

H would enable me to say that the gift of the second £5,000 is subject to a trust which can be enforced. It seems to me that the result here is that, as is admitted by all parties, the first £5,000 remains good, and is held upon the trusts expressed by the testator to the trustees previously to the will of Feb. 10, 1938, but that the second £5,000 falls back into residue, because it is given to the trustees apparently, but it is given upon a

trust which is not effectually declared, and consequently falls back into residue, and is in the same position as if it never had been given.

Solicitors: *Warren, Murton, Foster & Swan* (for all parties other than the beneficiary under the secret trust); *Elvy Robb & Co.* (for the beneficiary under the secret trust).

[Reported by F. HONIG, ESQ., *Barrister-at-Law.*]

GILLIE v. POSHO, LTD. (IN LIQUIDATION).

[PRIVY COUNCIL (Lord Thankerton, Lord Romer and Lord Porter),
January 16, February 3, 1939.]

Privy Council—Kenya—Evidence—Statement to third party—Not made in presence of defendant.

The appellant arrived in Kenya in 1926, and sought a farm suitable for wheat-growing. He negotiated with a firm of land agents, of whom one Hunter was the senior partner, and was recommended to purchase one of 9 farms belonging to the respondent company, of whom Hunter was the liquidator, eventually acquiring one of them. These farms were advertised for sale in the *EAST AFRICAN STANDARD* of Jan. 29, 1927, as suitable for growing maize, wheat, and coffee. The agreement for purchase was dated Feb. 3, 1927. The appellant attempted to grow wheat on the farm until 1930, when it was established that the land was not suitable for the purpose. Meanwhile, the appellant had fallen into arrears with his payments, and the company instituted proceedings for the amount due, or, alternatively, to have the agreement rescinded, possession delivered to the company, and the moneys already paid by the appellant forfeited. In his defence, the appellant alleged that he was induced to enter into the agreement to purchase by Hunter, who had fraudulently represented to him that the land was suitable for growing wheat, and that, in addition, the advertisement in the newspaper had stated that the land had been proved for wheat, and that such advertisement had finally caused him to purchase the farm. Hunter denied making the alleged representations, and stated in evidence that by Dec. 23, 1926, long before the appearance of the advertisement, the appellant had already agreed to buy the land. In support of this contention, a letter from Hunter to the company's solicitors, dated Dec. 23, 1926, was produced, tendered, and accepted, in evidence in the court below as showing that the negotiations were concluded prior to the appearance of the advertisement, and that the appellant could not have been influenced by its terms:—

HELD: the letter in question was plainly inadmissible, either in examination-in-chief or in cross-examination. It was no part of the *res gestæ*. At most, it was a statement made by Hunter to a third party, of which statement the appellant had no knowledge, and the truth of which he never directly or indirectly admitted.

[EDITORIAL NOTE.] A statement made by a party to an action to a third party is only admissible when the other party is present at the time the statement is made. Some exceptions to this rule have been made in criminal cases, but there are no exceptions to it in civil cases. The real point of such evidence is not so much the statement made as the reaction of the other party when he hears it.

AS TO STATEMENTS TO THIRD PARTIES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 579, 580, para. 653; and FOR CASES, see DIGEST, Vol. 22, pp. 79, 80, Nos. 469-484.]

Cases referred to:

- (1) *R. v. Osborne*, [1905] 1 K.B. 551; 14 Digest 399, 4199; 74 L.J.K.B. 311; 92 L.T. 393.
- (2) *Jones v. South Eastern & Chatham Ry. Co.'s Managing Committee* (1918), 87 L.J.K.B. 775; 22 Digest 80, 489; 118 L.T. 802; 11 B.W.C.C. 38.

A APPEAL *in forma pauperis* by special leave from a decree of the Court of Appeal for Eastern Africa (SIR JOSEPH SHERIDAN, C.J., LAW and THOMAS, J.J.), dated Dec. 31, 1932, dismissing the appellant's appeal from a decree of the Supreme Court of Kenya (SIR JACOB BARTH, C.J.), dated July 16, 1932. The facts of the case are fully set out in the judgment of their Lordships delivered by LORD PORTER.

B *Ralph Sutton, K.C.*, and *Roger Pezzani* for the appellant.

The respondent was not represented at the hearing before their Lordships, and the appeal was heard *ex parte*.

C LORD PORTER: This is an appeal *in forma pauperis* by special leave from a decree of the Court of Appeal for Eastern Africa pronounced on Dec. 31, 1932, dismissing the appellant's appeal from a decree of the Supreme Court of Kenya, dated July 16, 1932. The facts giving rise to the dispute between the parties were as follow. The appellant arrived in Kenya towards the end of 1926, and was anxious to find a farm on which he could grow wheat. For that purpose, he was sent to the office of the firm of W. C. Hunter & Co., a firm of land agents of whom Wilfred Clare Hunter was the senior partner. He had been told to see, and did see and negotiate with, Mr. Hunter personally some time towards the end of Dec., 1926. In addition to being a member of the firm of land agents, Mr. Hunter was also liquidator of the respondent firm Posho, Ltd., and agent for the sale of some 9 farms belonging to that company. After the purchase of certain other farms had been discussed, and rejected on the ground that they were unsuitable in price, or otherwise, Mr. Hunter suggested that the appellant should consider the suitability of one of the farms belonging to the company. Negotiations appear to have begun in Dec., 1926, and the appellant ultimately acquired one of the 9 farms, but the date on which the appellant decided to purchase is in dispute.

G The appellant's story is that the farms were brought to his notice by Mr. Hunter, that he said that he did not want a farm which had not been proved for wheat, and that Mr. Hunter assured him that the land in question had been proved for wheat and sent him to see one McAntee, who was working a neighbouring farm. The appellant paid a visit to McAntee, who admittedly had an optimistic view of the wheat-growing possibilities of the land, and, after seeing him, he agreed to buy. However, he avers that before he did so he was shown an advertisement in the offices of Messrs. Hunter in the following terms:

LAND FOR SALE.

Nine undeveloped farms the property of Posho, Ltd., in liquidation, varying in extent from 500 to 1,000 acres approximately, at prices varying from £2 to £3 per

acre, suitable for maize and wheat and in parts coffee—very little clearing required. Maize and wheat proved on property. Railway adjoining. Apply to W. C. Hunter & Co.

This advertisement appeared in the edition of the EAST AFRICAN STANDARD published on Jan. 29, 1927, but the appellant alleges that he saw it at the offices of Mr. Hunter at least some days before that date, and possibly even as much as 3 weeks earlier. It is not definitely stated in the record by whom it was brought to his attention, but Mr. Nicholson, a partner in the firm of W. C. Hunter & Co., is said to have told him of it. The agreement for purchase was dated Feb. 3, 1927, and is made between W. C. Hunter, as liquidator, and the appellant. The price was £2 10s. per acre payable by instalments. The purchaser was entitled to possession as from Feb. 3, 1927, and to a legal assignment of the property as soon as he had paid all the instalments, subject only to the apportioned rent payable to the government, whatever that rent might be. Clause 7 provided as follows :

In the event of any instalment of the purchase price or any part thereof or any interest thereon being in arrear for 14 days after the date on which the same should be paid the liquidator shall be entitled to rescind the sale without legal process on giving 15 days' notice in writing to the purchaser to pay the same or leaving such notice at the said premises and in default of payment before the expiration of such notice all payments made by the purchaser shall be absolutely forfeited. This clause shall be without prejudice to the right of the liquidator to sue the purchaser for the purchase money or any part thereof remaining unpaid or to any other remedies allowed by law.

The appellant's case is that he relied upon the assurance of Mr. Hunter, and on the statement in the advertisement, that the land was proved for wheat; that, unless he had had that assurance, he would never have purchased; that in fact the land had not been proved for wheat, and was useless for wheat-growing; that Mr. Hunter either knew that the land had not been proved for wheat or at any rate did not know whether or not it had; that the appellant had been induced by this false assurance and statement to make the purchase, and that he was entitled to damages for the loss he had sustained thereby.

So far as is material, the subsequent history of the appellant's efforts is that he tried to grow wheat on the farm until 1930, but had ascertained by that time that the land was not suitable for wheat. Meanwhile, he had fallen into arrears with his payments, and a number of letters passed between him and Mr. Hunter with reference to the payment or non-payment of instalments and rent. Eventually the appellant accused Mr. Hunter of deceiving him in the sale of the property by representing that it was proved wheat-land, and Mr. Hunter denied that any such representation had been made. The company thereupon brought action by plaint dated Nov. 17, 1930, for past instalments amounting to 11950.00s. plus interest at 8 per cent. until payment, and for past apportioned rent of 82.32s., and for acceptance of an assignment of the premises, or, alternatively, under cl. 7, that the agreement be rescinded and possession delivered to the plaintiffs and that the moneys already paid by the appellant in respect of the purchase money be forfeited.

By a written statement of defence dated Dec. 19, 1930, the appellant alleged that he was induced to enter into the agreement for purchase by Mr. Hunter, who had fraudulently represented to him that the land was more suitable for growing wheat than another farm which he had contemplated purchasing and that wheat had been proved on the property.

A He further stated, in para. 4 :

In addition to the direct representations made to the defendant as set out in para. 3 hereof, the said Wilfred Clare Hunter published a series of advertisements in the press advertising the said property for sale and stating that the same had been proved for wheat such advertisements being brought to the notice of the defendant at the time he was contemplating entering into the said agreement and finally caused him to make up his mind to purchase the said farm.

B In addition, the appellant alleged in para. 5 that Mr. Hunter knew that the appellant was relying upon his advice and assurance in purchasing the farm, and also knew that the land was unsuitable for wheat-growing.

C After an abortive trial before DICKINSON, J., the case was tried in the Supreme Court of Kenya before SIR JACOB BARTH, C.J. In that action, Mr. Hunter denied, as he had denied in his letter, that he had made any representations to the appellant. The appellant, he asserted, had never asked him for any assurance as to the land's capabilities, and he was not aware that the appellant was relying on him for a choice or recommendation as to the farm. As to the advertisement, he said that it first appeared on Jan. 29, 1927, that he came to England in Feb., 1927, that he did not see the advertisement until the following October or thereabouts, that he then complained of it to his staff, and that, if it had been submitted to him, it would not have been inserted. Indeed, he did not try to justify the statement that the land was proved for wheat, but he said that by Dec. 23, 1926, long before the appearance of the advertisement, the appellant had already agreed to buy the land, and it followed, therefore, that, even if he were shown the advertisement, it could not have influenced his mind. In support of Mr. Hunter's allegation that the appellant had agreed to make the purchase in Dec., 1926, a letter dated Dec. 23, 1926, from him to a firm of solicitors acting for the company was produced. The appellant was cross-examined on it, and it was tendered and accepted in evidence. SIR JACOB BARTH, C.J., by his judgment, dated July 16, 1932, found that the defendant had failed to substantiate his allegations of misrepresentation, and said, as to the letter of Dec. 23, 1926 :

H The letter of Dec. 23, 1926, in my opinion amply supports Mr. Hunter's assertion that the negotiations were concluded with the defendant before that date and that the advertisement of Jan. 29, 1927, which did not come to Mr. Hunter's notice until much later, had no influence on the defendant's determination to buy the land.

He accordingly ordered that the agreement be rescinded, that possession of the premises be delivered to the plaintiff, and that the moneys already paid by the defendant in respect of the purchase price be forfeited. The appellant thereupon appealed to the Court of Appeal for Eastern Africa. On that appeal, the judgment of the court of first instance

was upheld. The judges of the Court of Appeal held that the question was one of fact, on which SIR JACOB BARTH, C.J., was right. They agreed with the finding of SIR JACOB BARTH, C.J., that the advertisement had no influence on the appellant's mind :

This finding is supported by the evidence, and, to our minds, particularly by the date of the agreement. The agreement was executed on Feb. 3, 1927, and the terms of it must have been settled prior to Jan. 29. . . . The question before the court was one of fact, and the judgment of the court below, in our opinion, was correct.

It is true that the question was one of fact, to be determined by the court trying the case, after seeing the respective parties in the box and hearing their evidence and any other admissible evidence which should be adduced. If, in the present case, the decision had been confined to the question whether Mr. Hunter had made oral representations to the appellant, their Lordships do not consider that they would have been entitled to interfere with the finding of the court below that the making of such oral representations had not been established, unless, indeed, that finding was, or might have been, influenced by evidence which ought not to have been admitted. So much the appellant's representative conceded. However, the decision was not so confined. The appellant complained that he had been induced to make the purchase, not only by the oral representations, but also by the advertisement which he said had been shown to him and had formed at any rate a substantial part of the material which influenced him in making up his mind.

The appellant stated in evidence that he was shown the advertisement in Mr. Hunter's office some time before the completion of the agreement on Feb. 3. Neither court has cast doubt on this allegation, but, as is shown by the passages quoted above, the court below directly, and the Court of Appeal inferentially, relied upon the letter of Dec. 23, 1926, and its contents to show that the appellant could not have been influenced by the terms of the advertisement. In their Lordships' view, this letter was plainly inadmissible, either in examination-in-chief or in cross-examination. It is no part of the *res gestæ*. At most, it is a statement made by Mr. Hunter to a third party of which the appellant had no knowledge, and the truth of which he never directly or indirectly admitted.

In certain cases, as, for example, in the cases of sexual offences against women, statements made to third parties are in some circumstances admissible, but the careful limits placed upon the admissibility of such statements are evidence of the jealousy with which their admission is regarded. They must be complaints made voluntarily and at the earliest convenient moment, and even then they are received, not as evidence or corroboration of the facts complained of, but as evidence of the credibility of the complainant's testimony to the facts alleged, and, where consent is a defence, to negative consent. They are inadmissible in any other class of case : *R. v. Osborne* (1).

In *Jones v. South Eastern & Chatham Ry. Co.'s Managing Committee* (2), an attempt was made to enlarge the classes of case in which such evidence is admissible. In that case, the plaintiff, who had met with an accident, as she alleged, in the course of her employment, was cross-examined as to statements made to third parties as to the cause of her injury.

A When she in turn was called as a witness, evidence was sought to be given as to statements in her own favour made by her to third parties, but was rejected. On appeal to the Court of Appeal, SWINFEN EADY, L.J., said, at pp. 777, 778 :

B . . . it was argued that there is in certain cases a rule under which a witness may be asked to give particulars of what a person has said shortly after an occurrence, and the complaint that such a person may have made shortly after an occurrence, not as being evidence of the facts complained of but as being evidence of the consistency of the story of the complainant from beginning to end, and it is said that such a question ought to have been admitted in the present case on that principle. The answer, is twofold ; first, that the principle has no application to a case of this kind. No doubt in cases especially of violence upon women and girls the rule is established
C under which a question of that kind is allowed to be put. . . . That is a special class of case. . . . Secondly, this statement was made two days after the alleged accident, and not shortly afterwards. If a statement of that kind were admitted, it would be easy to manufacture evidence by telling your various friends, and then calling them as witnesses to prove what you had told them.

In the same case, NEVILLE, J., set out the general rule applicable to
D that case, and, as their Lordships think, to this case, at p. 779 :

. . . we have simply to apply here the general rule of evidence that statements may be used against a witness as admissions, but that you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony.

E In their Lordships' view, these observations correctly set out the rule of evidence applicable to this case, and the letter is inadmissible on both the grounds referred to above. No evidence has been given to show whether the statements in the letter were made with reference to some event which had only just happened, but, quite apart from the time that elapsed between the happening of the event and the recording of
F the statement, the letter is, in their Lordships' view, inadmissible upon the other ground given by SWINFEN EADY, L.J. The letter was tendered and received by the court in order that its contents might be used in evidence to prove that the appellant had made up his mind to purchase the farm before he saw the advertisement, and the courts relied upon it as at least
G corroboration of that fact. For this purpose, it was wholly inadmissible, and, in these circumstances, the case must go back to be tried by a court of first instance upon evidence which the court can properly receive, and upon such evidence only.

H Their Lordships would desire to add that, in their opinion, it is not legitimate to draw the inference that the agreement of Feb. 3, 1927, would require more time for preparation than the time between Jan. 29 and Feb. 3, even if the appellant did not see the advertisement until that date. No evidence to that effect was given, and, as the document is neither long nor difficult, four or five days seems ample time in which to draft it. However, it will be for that court, after having heard the

respective parties, the appellant and Mr. Hunter, and such other evidence and circumstances as may be legitimately put before the court, to decide who is in the right. In so deciding, it should not admit, or pay any regard to, the contents of the letter of Dec. 23, 1926, either as evidence of the truth of its contents or as evidence of the consistency of Mr. Hunter's story. Their Lordships will humbly so advise His Majesty. A
The appellant, who has been successful before their Lordships' Board, will receive the costs of the appeal to the Court of Appeal for Eastern Africa, and the costs of this appeal, the latter on the pauper scale. The costs in the court below should abide the result of the new trial.

Appeal allowed with costs. B

Solicitors: *A. L. Bryden & Co.* (for the appellant).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*] C

METROPOLITAN PROPERTIES, LTD. v. JONES.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge),
March 14, 15, 16, 1939.]

Nuisance—Noise—Flat—Installation by landlord of heating apparatus in adjoining flat—Electric motor part of heating apparatus—Liability of landlord—Legal estate in lease outstanding—Right of tenant to sue. D

The plaintiffs leased a flat to the defendant, who assigned the lease to S. S. absconded, and the defendant re-entered the flat. During S.'s tenancy, the plaintiffs installed heating apparatus in the flat above. An electric motor was operated in order to circulate water in conjunction with this apparatus. The plaintiffs brought an action to recover rent, and the defendant counterclaimed for damages for nuisance. It was found as a fact that for a period of 3 weeks the noise from this motor amounted to a nuisance:— E

HELD: (i) the nuisance was not one of a merely temporary character, but was one which would give rise to a cause of action.

(ii) the person liable was the landlord, who had installed the apparatus, and not the tenant of the flat above, who was merely using the apparatus in the only way in which it could be used. F

(iii) the defendant, being an original lessee who had parted with the whole legal estate in the term to his assignee, could not maintain a counterclaim for nuisance.

[EDITORIAL NOTE. *Prima facie* an occupier of property is liable for a nuisance caused thereon, but the liability can, in certain circumstances, be shifted to the owner. Here the liability is so shifted by reason of the fact that the offending apparatus was installed by the owner. On the other hand, the only person entitled to claim damages for nuisance is the owner of the legal estate in the property, and, even where there is only a bare legal estate outstanding, that is sufficient to bar the remedy. G

AS TO RIGHTS OF TENANTS IN NUISANCE, see HALSBURY, Hailsham Edn., Vol. 24, pp. 79, 80, 85-87, paras. 138, 139, 149; and FOR CASES, see DIGEST, Vol. 36, pp. 209, 210, 215-217, Nos. 516-528, 580-591.] H

Cases referred to:

(1) *Gandy v. Jubber* (1865), 5 B. & S. 485; 31 Digest 345, 4883.

(2) *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L.T. 1; Digest Supp.

- (3) *Rich v. Basterfield* (1847), 4 C.B. 783 ; 36 Digest 216, 584 ; 16 L.J.C.P. 273 ; 9 L.T. O.S. 77, 356.
- (4) *Malone v. Laskey*, [1907] 2 K.B. 141 ; 36 Digest 209, 527 ; 76 L.J.K.B. 1134 ; 97 L.T. 324.
- (5) *Stait v. Fenner, Fenner v. McNab*, [1912] 2 Ch. 504 ; 31 Digest 419, 5650 ; 81 L.J.Ch. 710 ; 107 L.T. 120.
- A (6) *Malzy v. Eichholz*, [1916] 2 K.B. 308 ; 31 Digest 133, 2666 ; 85 L.J.K.B. 1132 ; 115 L.T. 9.
- (7) *Wilchick v. Marks & Silverstone*, [1934] 2 K.B. 56 ; Digest Supp. ; 103 L.J.K.B. 372 ; 151 L.T. 60.
- (8) *Harris v. James* (1876), 45 L.J.Q.B. 545 ; 36 Digest 216, 589 ; 35 L.T. 240.
- (9) *Andreae v. Selfridge & Co., Ltd.*, [1937] 3 All E.R. 255 ; Digest Supp. ; 157 L.T. 317.
- B (10) *Williams v. Heales* (1874), L.R. 9 C.P. 177 ; 31 Digest 406, 5523 ; 43 L.J.C.P. 80 ; 30 L.T. 20.

ACTION for rent reserved by a lease. The plaintiffs had obtained judgment on the claim, and the only issue before the court in the proceedings here reported was a counterclaim for damages for nuisance. The defendant became the tenant of a flat in London for a term of 10 years, at a rent of £300 per annum rising to £500 per annum. In Feb., 1935, he assigned the term to one, Dr. Storer, who later left the premises and could not be traced. The defendant later re-entered the premises, since he was liable under the covenant in the lease to pay the rent, but no re-assignment from Dr. Storer to the defendant was executed. The legal estate in the term was then left outstanding in Dr. Storer. The plaintiffs, as the landlords of the premises, had installed in the flat above that occupied by the defendant a central heating system, the circulation of the water in which was maintained by a small $\frac{1}{2}$ h.p. electric motor. The defendant complained of the noise caused thereby, and certain alterations to the apparatus were thereupon made. The counterclaim was for damages for nuisance, the nuisance being the noise due to the running of this motor. It was found as a fact that there was no appreciable disturbance of the defendant's comfort after the alterations to the apparatus had been made.

P. E. Sandlands, K.C., and *A. E. Beecroft* for the plaintiffs.

W. H. Cartwright Sharp, K.C., and *S. P. J. Merlin* for the defendant.

Sandlands, K.C. : The defendant has sued the wrong party. The plaintiffs do not use this machinery. It is the owners of the flat above. [Counsel referred to *Malone v. Laskey* (4).] The person liable is the occupier, not the owner : *St. Anne's Well Brewery Co. v. Roberts* (2). This machinery was not bound to be a nuisance. The landlords did not license their tenants to use it in such a way that it was a nuisance. Unless the landlord knows at the time that that which he installs is a nuisance, and must be a nuisance, he is not liable. [Counsel referred to *Malzy v. Eichholz* (6), *Wilchick v. Marks & Silverstone* (7), *Harris v. James* (8), *Gandy v. Jubber* (1), *Andreae v. Selfridge & Co., Ltd.* (9), and HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 24, p. 86.] This was only a temporary nuisance, and it was remedied.

Merlin : The landlords are estopped from saying that the defendant has no interest in the property. The defendant went into possession with their knowledge and consent. Even a squatter can bring an action for nuisance. [Counsel referred to *Williams v. Heales* (10) and *Stait v. Fenner* (5).]

GODDARD, L.J. (having stated the facts) : On the facts, I think that I ought to hold that for 3 weeks there was an annoyance from this motor sufficient to be dignified by the name of a nuisance. The noise commenced at 8 a.m., after which hour an elderly gentleman is quite entitled to stay in bed, if he wants to, and have a restful time, and it finished at 7 p.m. I do not think that there was much interference in the daytime, because Mr. Jones went to other places, but there was none the less some interference with his comfort for a period of 21 days. He could have done his work in the lounge, and he had another office, but he can say with force : "I wanted to work there. I had my books and papers at Cavendish Square. I did not want to go down to Cadogan Square. I went down more frequently to Brighton." If I fix at £21 the damages recoverable for that period of 3 weeks, I think that I am erring on the generous side, but I am going to fix the damage for that period at that figure. Then comes the period after that time, in regard to which I am satisfied there was no nuisance whatever.

The question of whether or not Mr. Jones will recover the £21 depends on various other considerations. The first objection which Mr. Sandlands takes is this. He says that I cannot give damages against the plaintiffs, because the plaintiffs did not cause the nuisance, and that the only persons who are liable for that are the occupiers. In the circumstances of the case, I do not think that that argument is right. This motor was put in by the landlords for their tenants. I do not mean that the landlords put it in as mere contractors for their tenants. It was installed by the landlords, it is admitted, as a landlords' fixture, so to speak, for the purpose of warming these premises. The reason why I find that there was sufficient annoyance to cause a nuisance for 3 weeks is that it was not installed as well as it might have been. If it had been installed in the way in which it is now installed, there would have been no justifiable complaint at all. As soon as it was altered, any justifiable complaint ceased. The landlords, having installed it, must, I think, be taken to have let the premises with a nuisance which they themselves created upon them. I do not think that the cases which have been cited, *Gandy v. Jubber* (1), *St. Anne's Well Brewery Co. v. Roberts* (2) and the other cases, touch that position at all. It is not a question of letting ruinous premises. It is a question of having put into the premises something which, when used by the tenant exactly as it was intended to be used, and in the only way in which it could be used, caused a nuisance to an adjoining flat. If they had put in a motor which could be run at a high speed or at a low speed and the tenants had chosen always to run it at a high

speed, causing nuisance, whereas if they had run it at a low speed no nuisance would have been caused, different considerations would have arisen.

- In *Rich v. Basterfield* (3), to which Mr. Sandlands referred, a furnace could be used properly, so as not to cause smoke, and improperly, so as to cause a nuisance. The landlord was not held liable, because he had done nothing wrong. It was the tenant who had done wrong. Here the tenants used the heating apparatus which was supplied by their landlords in exactly the way in which it was intended that it should be used. I think that very likely there would be a cause of action against the tenant as well. It would not be any answer for the tenant to say: "My landlord put it there." The answer is: "You must not use it if it causes a nuisance." It is the landlord who put it in for the tenant who is liable for the creation of the nuisance. Therefore, on that point Mr. Sandlands' argument fails. I think that it also fails on the second ground which he has taken—namely, that this is a nuisance of a merely temporary character. He relies on the class of case which shows that, where one adjoining owner is doing necessary repairs to his building in the ordinary course of affairs—the sort of thing any owner has to do, such as emptying a cess-pit in the ordinary course of sanitary requirements, or using a drill, or doing something of that nature, such as we all know owners have to put up with—that gives no cause of action. It is a mere temporary operation which is being carried on. If my neighbour is going to put up some bookcases in his house, or put in a new fireplace, for a day or two I shall be exposed, no doubt, to a considerable disturbance and knocking, which may be an intolerable thing, but the law does not regard that as a nuisance. A man may be doing that which is necessary for his house or his own comfort, just as I may do the same thing in my house the following month. It is one of those things which one has to put up with. I do not think that those cases apply to such a case as this, where the motor is so installed on the premises, and runs in such a way, as to cause a nuisance. I think that, as soon as that is done, the plaintiff gets a cause of action, and the fact that it can be stopped by reconstruction means only that the person on whose land the nuisance is need never have had it there. I think that the cause of action is none the less complete.

- On the last point of the case (which I think Mr. Sandlands took first), the answer is fatal. I am bound by *Malone v. Laskey* (4), in which the Court of Appeal appear to me to have laid down in terms that, unless the plaintiff in an action for nuisance has legal interest in the land which is alleged to be affected by the nuisance, he has no cause of action. I regret having to come to this decision on this part of the case, because I think that the position is a hard one for the defendant. Mr. Jones, having assigned to Dr. Storer, had no legal interest in these premises at all. His concern with the premises, if concern it can be called, was that he had to pay rent under his covenant because the assignee did not pay it.

In view of the decision in *Malone v. Laskey* (4), however, I find a difficulty in saying that I can award damages for nuisance. It is true that in *Malone v. Laskey* (4) the plaintiff was a servant. She was living in the premises, as she had a right to do, and nuisance there disturbed her enjoyment of those premises. SIR GORELL BARNES, P., who gave the leading judgment, said, at p. 151 :

Many cases were cited in the course of the argument in which it had been held that actions for nuisance could be maintained where a person's rights of property had been affected by the nuisance, but no authority was cited, nor in my opinion can any principle of law be formulated, to the effect that a person who has no interest in property, no right of occupation in the proper sense of the term, can maintain an action for a nuisance arising from the vibration caused by the working of an engine in an adjoining house. On that point, therefore, I think that the plaintiff fails, and that she has no cause of action in respect of the alleged nuisance.

The person who had the right of occupation at this time was the defendant's assignee, and, it was argued that, though the defendant had gone back and let himself into the flat, and was in fact occupying it, I ought to find that there was some new tenancy created. I am quite unable to do that. The plaintiffs throughout refused to forfeit this lease, and Mr. Jones remained liable on the lease though the assignee had his legal estate.

It seems to me that the view which I am constrained to take obtains much support from the decision of NEVILLE, J., in *Stait v. Fenner* (5), where the circumstances were not unlike those of this case. There was a lease, with a power to the lessee to determine at the end of 7 or 14 years. The lease had been assigned twice by the defendant, and the assignee in possession was not paying the rent, having disappeared. The lessee, therefore, naturally wanting to terminate his liability, purported to give a notice under the lease, to determine. It was held that he had parted with the whole of his interest in the property and could not give the notice. It seems to me that the same reasoning applies in this case. Therefore, I think that this action wholly fails. I should add that, if this case goes higher, and if I am held to be wrong with regard to the defendant's right to recover the sum of £21 which I have assessed as damages, I can only say that it would not have made any difference to the costs. The action was not brought to have it decided whether or not some small sum should be awarded for some little disturbance which Mr. Jones suffered for 3 weeks. The case was put on the much higher ground that he was really evicted from his flat, and that this was an intolerable nuisance. No distinction was drawn between the first period and the second period, and in any case I think it would be quite wrong to deprive the plaintiffs of their costs of fighting this counterclaim, even though I felt constrained to say that a small sum of money should be given to the defendant for some small damage that he has sustained. If this case goes to the Court of Appeal, if it should take the view that the damages of £21 are recoverable, I say that, if they were recoverable, it would not have made any difference in costs. I should have given judgment for the plaintiffs with costs. The result,

however, is that the counterclaim fails, and must be dismissed with costs.

Counterclaim dismissed with costs.

Solicitors: *McKenna & Co.* (for the plaintiffs); *Richard Davies & Son* (for the defendant).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

KENT AND PORTER v. EAST SUFFOLK RIVERS CATCHMENT BOARD.

[KING'S BENCH DIVISION (Hilbery, J.), **March 14, 15, 16, 17, 20, 21, 22, 1939.**]

Land Drainage—Catchment board—River-wall—Duty to repair—Liability for misfeasance—Negligent repair.

The plaintiffs were the owners of land protected by a wall from inundation by a tidal river. At a time when the height of a spring flood tide was increased by a northerly gale, the wall partly collapsed, leaving a breach 20 ft. to 30 ft. wide. As a result, the plaintiffs' lands were flooded. The defendants, the catchment board for the area in which those lands were situated, attempted to repair the breach by running a dam straight across it. It was proved that this method of repair was impracticable and that the correct method was to construct a V-shaped dam. It was also proved that the defendants had attempted the work with an insufficient number of men :—

HELD : (i) the Land Drainage Act, 1930, s. 34, does not place upon a catchment board an imperative duty to repair a breach in a drainage work. The power is purely a permissive one.

(ii) while the catchment board were not liable for non-feasance, they were liable for misfeasance.

(iii) on the facts, the board had undertaken the work of repairing the breach, and they had done that work negligently. The plaintiffs were, therefore, entitled to recover damages for the injury to their land.

[EDITORIAL NOTE.] The matter of the liability of a catchment board has been previously considered, though not, perhaps, with such a complete review of the authorities as is contained in the judgment herein. The further matter which arises herein—namely, whether, in the sudden emergency that arose, the board acted without negligence—is one of importance. The duties of such a board are various, and are complicated by reason of the fact that the proper method of carrying out such duties is largely dependent on local conditions. The present case, however, deals with conditions which will be generally applicable in such cases. It is essential both that the board should adopt the proper method of repair and that they should have sufficient labour to carry through the work.

AS TO DUTIES OF CATCHMENT BOARDS, see HALSBURY, *Hailsham Edn.*, Vol. 30, pp. 76-79, paras. 143-148; and FOR CASES, see DIGEST, Supp., *Sewers and Drains*, No. 399a *et seq.*

Cases referred to :

- (1) *A.-G. v. Tomline* (1880), 14 Ch.D. 58; 44 Digest 79, 606; 49 L.J.Ch. 377; 42 L.T. 880.
- (2) *Synes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board*, [1937] 1 K.B. 548; [1936] 3 All E.R. 908; Digest Supp.; 106 L.J.K.B. 279; 156 L.T. 116.

- (3) *West Norfolk Farmers' Manure Co. v. Archdale* (1886), 16 Q.B.D. 754; 41 Digest 53, 382; 55 L.J.Q.B. 230; 54 L.T. 561.
- (4) *A.-G. v. De Keyser's Royal Hotel*, [1920] A.C. 508; 11 Digest 546, 499; 89 L.J.Ch. 417; 122 L.T. 691; *affg. S.C. sub nom. Re De Keyser's Royal Hotel, Ltd., De Keyser's Royal Hotel, Ltd. v. R.*, [1919] 2 Ch. 197.
- (5) *Smith v. Cawdle Fen, Ely (Cambridge), Comrs.*, [1938] 4 All E.R. 64; Digest Supp. A
- (6) *Gillett v. Kent Rivers Catchment Board*, [1938] 4 All E.R. 810; Digest Supp.
- (7) *Sheppard v. Glossop Corpn.*, [1921] 3 K.B. 132; 38 Digest 34, 207; 90 L.J.K.B. 994; 125 L.T. 520.
- (8) *Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430; 43 Digest 1075, 116.
- (9) *McClelland v. Manchester Corpn.*, [1912] 1 K.B. 118; 26 Digest 404, 1270; 81 L.J.K.B. 98; 105 L.T. 707. B
- (10) *Penny v. Wimbledon Urban Council*, [1899] 2 Q.B. 72; 26 Digest 410, 1308; 68 L.J.Q.B. 704; 80 L.T. 615; *affg.*, [1898] 2 Q.B. 212.
- (11) *Konskier v. Goodman (B.), Ltd.*, [1928] 1 K.B. 421; Digest Supp.; 97 L.J.K.B. 263; 138 L.T. 481.
- (12) *Gilbert v. Trinity House Corpn.* (1886), 17 Q.B.D. 795; 38 Digest 39, 230; 56 L.J.Q.B. 85. C
- (13) *Coggs v. Bernard* (1703), 1 Salk. 26; 36 Digest 23, 112.
- (14) *Wilkinson v. Coverdale* (1793), 1 Esp. 74; 12 Digest 223, 1849.

ACTION for damages (i) for breach of a duty imposed upon the defendant board by the Land Drainage Act, 1930, s. 34, and (ii) for negligence in the performance of that duty. D

G. Russell Vick, K.C., and *Robert Fortune* for the plaintiffs.

F. W. Beney and *Hubert Hull* for the defendants.

Beney: What the plaintiffs complain of in this action amounts in law to non-feasance at most. By the Land Drainage Act, 1930, the defendants are given jurisdiction to repair the wall. *Gillett v. Kent Rivers Catchment Board* (6) supports the contention that the defendants are under no liability to carry out the work, though it is within their discretion to carry it out. The Act confers a discretion on the defendants, but it imposes on them no obligation to repair the wall, and leaves it to their discretion how far they will repair it, if at all. This is the principle expressed in *Sheppard v. Glossop Corpn.* (7). The dictum of DAY, J., in *Gilbert v. Trinity House Corpn.* (12) was not followed in the *Cawdle Fen* case (5). In the present case, as in the *Cawdle Fen* case (5), the plaintiffs are really seeking to put upon the defendants a duty which the legislature does not put upon them at all. This case falls within the principles of *Sheppard v. Glossop Corpn.* (7) and the *Cawdle Fen* case (5), because the defendants did not create the source of danger—namely, the breach in the wall—but only used their powers after it was created: see the remark of DU PARCQ, J., in the *Cawdle Fen* case (5), at p. 69. *Geddis v. Bann Reservoir (Proprietors)* (8) does not apply. There the defendants were empowered to send surplus water through an artificial channel. They were also empowered to keep that channel clear. They exercised the former powers, but did not properly exercise the latter, and the exercise of the former powers created the danger of flooding E
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adjoining lands, and, if they had exercised the latter power also, this damage would not have occurred. The House of Lords held that it was negligence not to exercise *both* powers if the defendants decided to exercise one. No precautionary measures could be taken to prevent this breach in the wall due to the action of the elements.

- A *Vick, K.C.* : It is the duty of the Crown to protect land from the invasion of the sea. *A.-G. v. Tomline* (1) restates this duty, which is illustrated in the *Essex Rivers Catchment Board* case (2). In his judgment, GREER, L.J., lays it down that any person who makes a gap or a hole in a sea-wall with the object of letting sea-water into the lands
- B which lie behind the sea-wall is committing an illegal act. In the same case, SCOTT, L.J., was of the opinion that it is an express or implied principle of the Land Drainage Act, 1930, that it is the duty of the relevant board, constituted under the Act, to look to the attainment of its two main objects—namely, (i) the control of the flow of inland
- C waters, and (ii) the keeping out of sea-water from farm lands. The Act also impliedly recognises and enshrines the old common law principle of public policy that farm lands ought to be protected from the sea. In this present case, though the wall is the property of the plaintiff Porter, the duties of maintenance and repair are vested in the board,
- D in that the same defendants by their servants and agents exercised jurisdiction over it. This follows from the decision in *West Norfolk Farmers' Manure Co. v. Archdale* (3). On the question of negligence, where a public authority come to a place where danger exists, and where damage is continually occurring to the property of a person
- E (whether owner or not), and the public authority undertake to remove the danger and stop the damage, knowing at the time that the damage will increase if the danger is not removed, they hold themselves out as having the necessary skill, equipment and labour to do the work reasonably and diligently, whatever their actual resources, and, if they
- F commence the work and fail to complete it properly, or if they complete the work and it breaks down and as a fact damage can be proved to have been caused by their failure to do such work reasonably and diligently, they are responsible for such damage. *Geddis v. Bann Reservoir (Proprietors)* (8) supports the contention that work may be carried out,
- G and in some cases must be carried out to its fullest extent, in the manner provided by the Act, but that in doing so there must not be created any needless injury. The powers which are exercisable are exercisable for the prevention of mischief. In *McClelland v. Manchester Corpn.* (9), at p. 127, LUSH, J., distinguishes misfeasance from non-feasance. *Smith*
- H *v. Cawdle Fen, Ely (Cambridge), Comrs.* (5) can be distinguished from the present case in that the judge there held that the wall or bank was too low to keep out the floodwater. What was complained of was a failure to do that which there was power and authority to do, not, as in the present case, a failure to exercise such power adequately. The law is plain that whosoever undertakes the performance

of, or is bound to perform, duties—whether they are duties imposed by reason of the possession of property or duties imposed by the assumption of an office—is liable for injury caused by his negligent discharge of those duties. What is complained of by the plaintiffs in this action is not a breach of statutory duty, as was complained of by the plaintiffs in *Gillett v. Kent Rivers Catchment Board* (6), but negligence A in that the defendants took upon themselves the liability to repair the wall, and were negligent in carrying out that work. It is not a question of the defendants' liability to do the work of repairing the wall, or a question of the work of repairing the wall being within the discretion of the defendants, following the decision of *Sheppard v. Glossop Corpn.* (7). B The defendants undertook to carry out the work of repairing the wall. They made the breach in the wall larger by their negligence, and caused added injury to the plaintiffs by littering their farmlands with abandoned sacks and material, and by permitting larger quantities of water to flow on to the land. Such injury could have been avoided if correct methods C had been adopted from the beginning. Applying the principle in *Penny v. Wimbledon Urban Council* (10), the plaintiffs are entitled to damages for this negligence on the part of the defendants. Whether the defendants had in fact the necessary resources to carry out the work efficiently and quickly is immaterial. [Counsel referred to *Gilbert v. Trinity House Corpn.* (12), at p. 800.] Although the plaintiffs could have repaired the wall themselves, the defendants, by undertaking the work themselves, D led the plaintiffs to rely upon them to do the work properly and quickly. [Counsel referred to *Coggs v. Bernard* (13) and *Wilkinson v. Coverdale* (14).]

Hull: The plaintiffs contend (i) that before the passing of the Land Drainage Act, 1930, the Crown was under a duty of imperfect obligation E to repair this wall, and (ii) that this duty was transferred to the defendants by the Land Drainage Act, 1930. As to (ii), *A.-G. v. Tomline* (1) does not support this contention. In any event, *West Norfolk Farmers' Manure Co. v. Archdale* (3) shows that the decision in *A.-G. v. Tomline* (1) extends F to natural banks only, though possibly to artificial banks when they are made by the Crown. As to (ii), the question of what duties were laid upon the defendants by the Land Drainage Act, 1930, depends on the terms of that Act. There is nothing in that Act to impose such a duty. The passage relied on in the judgment of SCOTT, L.J., does not bear the G meaning put upon it. In any event, it is *obiter*.

HILBERY, J.: In this case, the plaintiffs are Henry Kent and Richard George Porter. Henry Kent is a tenant farmer and the occupier of a farm and premises in Suffolk known as Hemley Hall. The plaintiff H Richard George Porter is the freeholder of that farm and those premises. About 50 acres of marshland, which area forms the greater part of the pasturage of the farm, lie adjacent to some of the upper waters of the River Deben. Between that marshland and the River Deben, there has existed for a number of years (and certainly for as long as the plaintiff Porter

remembers, though that, of course, is not a very long time) a wall. The part of the River Deben to which this land is adjacent is tidal, and that wall is a necessary protection to keep the incoming tides from coming on the land when they have risen above a certain point. The defendants, the East Suffolk Rivers Catchment Board, are a catchment board
 A authority constituted under the Land Drainage Act, 1930. Constituted in that way, they have all the powers which are vested in them by that Act, and there is no doubt that this river is one of the rivers which is in the area for which they are the catchment board.

On Dec. 1, 1936, a northerly gale occurred at the time of high water
 B with spring tides. The River Deben runs very nearly north and south, so that the effect of the coincidence of a northerly gale with a spring flood tide such as occurs at the top of the springs is, on the River Deben, to result in the water reaching a much higher level than that which it would reach without those particular conditions being in existence.
 C This tide was a very high tide, but was not, on the evidence before me, the highest tide that had been known. It was within 6 ins. of the highest tide, I think, that had been known to occur at that spot. In those circumstances, that tide broke through the protecting wall, which lay, as I have said, between Hemley Hall marshland and the river. It made
 D a breach in the wall of something like 20 ft. to 30 ft., and, of course, an inundation of the marshes resulted. Mr. Porter, who had been made acquainted with what had happened, wrote a letter on Dec. 2, addressing it to the Clerk, River Deben (Lower) Drainage Board, 21, Tower Street, Ipswich, and that letter was apparently passed to the clerk to the
 E defendants, who were the catchment authorities for this particular area in which lay this affected spot. The clerk to the board replied on Dec. 3. Mr. Porter had said in his letter :

I regret to report that the river-wall has been broken down by yesterday's high tide for about 25 yds. near the sluice, and the marshes are flooded.

F That must have been, I think, a mistake for 25 ft., because, on all the evidence, I am satisfied that the actual breach was something like 20 ft. to 30 ft. Mr. Porter then said :

I must request your board to take immediate steps to repair the damage.

G Mr. Cobbold, the clerk to the defendant board, acknowledged that letter, which he said had been addressed to him "as clerk to the River Deben (Lower) Internal Board," and wrote as follows :

The wall in question is a main wall, and comes under the jurisdiction of the catchment board, and I believe already has the attention of the board's surveyor.

H The defendants' representative viewed this spot as soon as possible after the flooding occurred. I will deal with that in more detail later on. The defendants embarked upon the work of closing the breach in order to exclude the tides from further flooding this land in question. It happened that that tide made 22 breaches on this river alone, but Mr. Clark said that he had had, I think, 30 breaches within the juris-

diction of the defendant board. He was up all night, and he managed to get to this breach to view it. He saw it with the man who was called before me for the plaintiffs, Mr. Studd, and with his assistant, Mr. Abbott. Mr. Studd had been in the employ of the defendants previously, and he had been engaged on repairing and cleaning such walls as this, and on repairing and cleaning the delphs and ditches. He said that in October A he could not see anything wrong with this wall, and that he had been unable to observe any rat-holes or rabbit-holes, the presence of which would create weaknesses in such a wall. He was there with Mr. Clark, the part-time surveyor of the catchment board, at about 6 a.m. on December 2, 1936, the day following the flood, and Mr. Clark there and B then decided with Mr. Abbott to instruct Studd to begin an effort to close the breach. That is to say, Mr. Studd, on behalf of the defendant board, decided to undertake the work of closing the breach in this wall. From that time until May 28, the catchment board were engaged in one way and another on the work of endeavouring to close that breach. C They did not effectively close it until May 28.

The plaintiffs' contention here is, first, that in such a case, and in such circumstances—that is, where there is a breach in such a wall—for a period the flood will do no appreciable damage but that time is the vital matter for consideration, and that it is a matter of prime D importance that an effective way of stopping the further inflow of water be found as soon as possible. That is not seriously contested by the defendants, through their witnesses. Mr. Clark, who gave evidence with obvious honesty and sincerity, said, in effect, that, in undertaking such work, one had to regard the work to be undertaken E from the point of view that it was essential to do it speedily, because of the serious damage that would ensue from day to day, and the fresh damage that would ensue from day to day, if the work were not done effectively and speedily. In other words, he knew at the outset that, if injury to the one plaintiff's land and to the other plaintiff's farm were F to be either averted or mitigated, the vital consideration was that the work should be undertaken so that it could proceed with speed to the desired conclusion—namely, the closing of the breach.

The plaintiffs complain that the work undertaken in that way was not done with reasonable care. Both plaintiffs say that, in the circum- G stances, once the defendants undertook the work, it became their duty, owed to them respectively, to execute it with reasonable care, so as to avoid injuring the plaintiffs and their respective interests in connection with this land which lay immediately behind the wall. The plaintiffs seek to establish that that duty was owed by the defendants, H in the circumstances, upon different legal grounds, or upon different grounds which are asserted to be legal grounds. In the first place, it is argued here that the defendant board, constituted under the Act, and with the powers which it was given under the Act, was not merely empowered to do the things which the Act empowered it to do, but was

under a duty to do them, and was under a positive duty imposed by the Act to do them. Sect. 34 of the Act provides as follows :

(1) Every drainage board acting within its district shall have power (a) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work . . .

- It is said, in the first place, that, since those are the provisions of the Act,
- A** the defendant board were under a duty, because they were thus empowered, first, to repair that wall in the exercise of what is said to be their duty to maintain. They say that, in the circumstances, I ought to infer that this wall broke, and this breach in this wall occurred, because of the failure, in the first place, of these defendants to perform
- B** that duty to maintain the wall. They say that, if that be right, all the damage which subsequently flowed can be traced, of course, to that breach of duty. There is no evidence before me that there was any want of repair of that wall by the defendant board. I have shortly referred to the evidence of Studd, an inspector, called by the plaintiffs.
- C** He said that from time to time in the course of his duties he had inspected that wall, and that on the inspection in October—the end of October was only some 8 weeks before—he had not observed any rat-holes, or rabbit-holes, or other weaknesses in the wall, and had not observed anything the matter with the wall. Of course, Studd, who was a
- D** responsible type of man—I saw him myself—must be taken to have gone along the wall as an inspector, and not as a mere pedestrian. There is not only no evidence that there had been any failure in what has been asserted as the duty of the catchment board to repair and to maintain—and I am not for one moment saying that I agree that they ever had any
- E** positive duty placed upon them by the Act to do those things—but there is also no evidence that, even assuming for a moment there were such a duty on them, they failed in that duty in any way which brought about this breach. I have had before me men of great practical experience in such matters, and nobody has been able—and I say nobody has
- F** been able to do so because nobody has done so—to state the cause of the breach that occurred. We do not know what that cause was. That wall had sustained the weight and force of an even greater tide, and had successfully withstood it. This tide, which was 6 ins. lower, however, in some unfortunate way discovered, either some weakness in the wall
- G** which was not apparent, and had not been apparent, to anybody, or some other thing which enabled it to get into and through the wall. Once that occurred, of course, at the point where the water either got through the wall or got over it and washed out some part of the supporting batter at the back, the wall crumbled, and the breach occurred.
- H** Therefore, so far as the first ground upon which it is put is concerned, quite apart from whether or not the Act can truly be said to place a duty upon the board to do those things which they are enabled to do and empowered to do under sect. 34, the evidence here does not establish that there was on the part of the board any such failure to maintain that wall as resulted in this breach.

In the next place, the plaintiffs' case is put in this way. It is said that, as a sea-wall, this wall was one which was regarded by the common law of this country as coming within the Crown prerogative, and the Crown prerogative included a duty—an imperfect obligation, it is true—on the part of the Crown to maintain such defences. It is said that the decision in *A.-G. v. Tomline* (1) is to be relied on. That decision shows A that the Crown had a prerogative right and duty [12 Ch.D. at p. 231]:

. . . to save and defend the realm, as well against the sea as against the enemies, that it should not be drowned or wasted.

The argument proceeds that that was the duty of the Crown, though it was an imperfect obligation, and could not be enforced against the Crown, B and that that duty passed to this board when they were constituted under this Act by the Land Drainage Act, 1930, and that, as that was a duty in the Crown, and was passed to this board in respect of this wall, it can be enforced to-day against this board, because this board can be sued, while the Crown, when it was a matter of prerogative and duty, could C not. Reliance was placed, as I have said, not only upon *A.-G. v. Tomline* (1), but also upon the fact that it has recently been decided by SCOTT, L.J., in *Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board* (2), at p. 927, that that is right, and that the powers with which this board are invested, so far as they are powers to D maintain and to repair such a wall as this river-wall, are powers which they are under a duty to exercise. The Act is to be regarded, not as permissive, but as imposing a duty to do those things which sect. 34 sets out in detail. For authority to take that step, reliance was placed upon what was said to be the decision of SCOTT, L.J., in *Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board* (2). E

I think that it is important to remember what was really being dealt with in *A.-G. v. Tomline* (1) and in *Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board* (2), and also to bear in mind what was said about *A.-G. v. Tomline* (1) in *West Norfolk Farmers' F Manure Co. v. Archdale* (3). First of all, it must be observed that in *A.-G. v. Tomline* (1) all that was being established was that, where a natural shingle bank formed a natural sea-wall, protecting the low-lying land behind it against flooding from the sea, a private owner could be restrained at the suit of the Crown from demolishing such a shingle G bank or impairing its strength so that it became an insecure defence against the tides. The Attorney-General in that case obtained what he sought—namely, an injunction:

. . . to restrain the defendant . . . from so digging or removing or authorising to be dug or removed any shingle from the natural barrier of shingle protecting from the sea the land forming the site of and the enclosure surrounding the U tower, as to endanger that land or expose it to the inroads of the sea. H

That case, it is to be observed, was in connection with a shingle bank formed naturally on the foreshore, and, through its natural formation, affording protection against the sea and acting just as an artificial sea-wall might have acted. However, it was not an artificial sea-wall, and,

when *Tomline's* case (1) was pressed in argument in *West Norfolk Farmers' Manure Co. v. Archdale* (3), LORD ESHER, M.R., said, at p. 758 :

... it seems to me that the effect of it has been exaggerated, and that the doctrine there established was meant to apply to natural protecting banks against the sea and the waters of tidal rivers.

A Then LOPES, L.J., said, at p. 760 :

There is only one other observation I desire to make, and that is with regard to the case of *A.-G. v. Tomline* (1), which has been cited to us. I quite agree with what has fallen from LORD ESHER, M.R., that that case only applies to the natural protecting banks, or to banks erected by the Crown, either under the Crown itself or through the agency of the commissioners of sewers.

B If those limitations are to be put upon *Tomline's* case (1), then there is no evidence before me that this wall on the River Deben in question in this case was erected by the Crown itself or through the agency of the commissioners of sewers. There certainly is evidence before me that it is not a natural wall, but built artificially. However, the matter

C does not rest there on this part of the case, because, when I turn to the *Essex Rivers* case (2), where it is said SCOTT, L.J., held that the Land Drainage Act was to be construed as imposing a duty on such a board as the present to do the things which are enumerated in sect. 34, I think that a consideration of the exact words used by

D SCOTT, L.J., and of the whole case, shows that SCOTT, L.J., was laying down no such thing. To put it very shortly, what the catchment board had done in that case was to stop the flow of water through a large culvert piercing a wall which had, on the one side of it, the land and the sea, and, on the other side of it, lower land. It was asserted

E against them that they had no right to interfere with the flow of water through the culvert. GREER, L.J., and EVE, J. (who was then sitting as an additional member of the Court of Appeal), dealt with that case without using any such words as occur in the judgment of SCOTT, L.J., and, quite shortly, they dealt with the case in this way. They said that

F the plaintiff had failed to make out his right to have an uninterrupted flow of water through that culvert, that he could not show that he had an easement, that he had failed to show anything like an easement, and that, therefore, his claim must fail. Neither of them said anything to indicate that the Land Drainage Act, 1930, has imposed duties to

G do those things which the catchment boards constituted by that Act are empowered to do. The passage that was relied upon so much in the judgment of SCOTT, L.J., occurs at p. 572 ([1936] 3 All E.R. at p. 927) :

H When in 1930 the whole series of statutes dealing with land drainage—what used to be called “sewers”—and sea defences, were repealed by the general Act of that year, I think Parliament must be presumed to have intended to deal with any residual prerogative rights and duties, and to entrust the whole of those two subjects to the various authorities mentioned in the Act, and also to maintain the general constitutional position in regard to sea defences which had been built up originally at common law and then taken over and developed by a series of statutes : see the opinions of LORD DUNEDIN and LORD ATKINSON in *A.-G. v. De Keyser's Royal Hotel* (4). Thus it appears to me to be an express or implied principle of the Land Drainage Act, 1930, that it is the duty of the relevant board, constituted under the Act, to look to the attainment of its two main objects : (1.) to control the flow of inland waters ; (2.) to keep out sea water from our farm

lands. The Act also, I think, impliedly recognises and enshrines the old common law principle of public policy that our farm lands ought to be protected from the sea. Where they lie below the level of high water, whether at ordinary or only at spring tides, the sea-defences of the country can ensure no effective legal protection unless the Act contains at least this implication.

Those words, I think, must in the first place be linked up with what occurs further on in the judgment of SCOTT, L.J., after his examination of the Act, for, after consideration of the Act in some detail, he says, A
at pp. 579, 580 ([1936] 3 All E.R. at p. 933):

The above considerations lead me to the conclusion that it was a main purpose of the Act to entrust a very wide measure of executive discretion to these new drainage boards and, *a fortiori*, to the catchment boards, who are not only made the primary executive authority wherever a main river is concerned, but also have to discharge the general duty of supervising the drainage boards. I cannot see on this basis that the defendants have exceeded their statutory discretion in any respect whatever under sect. 34 (1) (a) or (b); that any claim to compensation arose even if they were acting under para. (b); or in either case they were guilty of such conduct as the learned judge thought. They seem to me just to have been doing their duty; and I should like to add an emphatic protest against arguments that the powers of executive authorities entrusted by Parliament with important executive duties should be construed so as narrowly to limit their discretion. B
C

When one couples those passages together, what SCOTT, L.J., was saying, I think, was no more than this. They have a discretion to do certain work, and the way in which they will do that work and do those things is left to them, with a very wide discretion. All that they were doing here was to exercise a power which they had under the Act. SCOTT, L.J., D
is not saying that there was a duty to do what they were doing in that case—namely, to stop up the culvert. He is not considering the question of whether or not they had a duty to do it. The action was not, it must be remembered, one to seek to force them to close the culvert. It was an action to prevent them from closing the culvert, which in their E
discretion, they thought was an act essential for the safety of the wall. It seems to me, therefore, that the language which was being used there, read in its context, was not being used on a consideration of whether the Land Drainage Act, 1930, imposes duties to do the things which are numerated in sect. 34 or is an Act which merely enables the F
bodies constituted under the Act to do those things. Moreover, it is to be observed—and Mr. Hull has pointed it out—that SCOTT, L.J., uses language which he would not use if that were what he intended to say. Every lawyer is well acquainted with the difference between an Act which enables or empowers a body to do things and an Act which G
imposes upon a body a positive duty to do things. What SCOTT, L.J., said was that it is the duty of the relevant board constituted under the Act to look to the attainment of its two main objects. One of the objects to the attainment of which it was looking and which was in question in that case was the maintenance in a safe condition of that H
particular wall, and what it was doing in that case was merely to close a culvert in the exercise of its discretion and in the exercise of the power given to it to repair or maintain, or keep in an efficient state, that wall.

I do not think that the plaintiffs' case succeeds upon that first argument. I have allowed it to be developed because it was opened at the

very outset of this case. I should say that, in the circumstances, of course, I have had very little assistance as to whether or not this wall could ever be said to have been a wall which was the subject of the old Crown prerogative at all. I allowed this matter to be gone into, but the difficulty of the plaintiffs was not lessened by the fact that it had

A not apparently been thought of as part of their cause of action when the pleading was delivered, and when the particulars under it were delivered, because para. 2 of the statement of claim alleged that it was the defendants' duty at all material times to repair this wall in question and to keep it in efficient repair. The defendants rightly
B asked for particulars of the duty referred to in that paragraph :

. . . stating under what statute and section the said duty arose and the facts and circumstances relied upon as giving rise to such duty.

The plaintiffs then confined themselves to the particulars that they thereupon delivered in answer to that request, and there they said that
C they would rely upon the fact :

. . . that on or about Dec. 2, 1936, Mr. T. C. Clark, the defendants' surveyor at Hemley personally inspected the breach at Hemley Hall and immediately took steps to have the wall rebuilt. The plaintiffs will also rely upon the letters from the defendants dated Dec. 3, 1936, Jan. 11, 30, Mar. 4, 8, 13, and Apr. 19, 1937.

There was no hint in all that, and until this case was opened in this
D court—and, so far as I know, there never had been a hint—that reliance would be placed upon this basis upon which the plaintiffs' case might be put—namely, the first argument with which I have just endeavoured to deal. However, as I say, as it was argued at the beginning of the case, I have dealt with it, and now, of course, it has to be taken as a part
E of the plaintiffs' case. I say that because I know that the plaintiffs desire to keep that point open for argument later on, if this case goes to appeal. The first argument in the plaintiffs' case, therefore, fails.

I should have added that in two cases recently this Act has been treated as an Act which did not direct or require a board constituted
F under the Act to do work, but merely authorised it to do the work. It was conceded, apparently, by counsel for the plaintiff that that was the situation in *Smith v. Cawdle Fen, Ely (Cambridge)*, Comrs. (5) and in *Gillett v. Kent Rivers Catchment Board* (6). STABLE, J., in the latter case, said, at p. 814 :

G I am not for a moment, of course, suggesting that, if, in the exercise of its powers, the board or their servants does something which infringes the common law rights of third persons, the mere fact that what they are doing is being done in the performance of a power created by the Act of Parliament affords a defence to an action for negligence at common law. I am not suggesting that for a moment. In my view, however, on the true construction of the Act of Parliament, if all that is complained of is that the drainage board have not maintained in a due state of efficiency one of the watercourses or drainage works in their area, that omission
H to exercise their power does not render them liable to be sued for damages in an action. . . . That is the view I take of the Act, and that view is, in my judgment, confirmed by the decision of DU PARCQ, J., as he then was, in *Smith v. Cawdle Fen, Ely (Cambridge)*, Comrs. (5).

I think that it is obvious that the view which I have taken of the situation of the defendant board under the Land Drainage Act, 1930, was the view taken in each of these last two cases which I have mentioned.

How is it, then, that the plaintiffs in the second place put their case ? They say : " If that be the right view of the Act, of course, the defendants may not be compellable to do anything. If they had merely done nothing, it might be true to say that we, the plaintiffs, could not have come to the court to compel them to repair the wall. If they took that attitude, the remedy was in the hands of the landowner. It was his property. He could repair it. He could rebuild it. He could do it himself. The situation is different, however, where a statutory body such as the defendants does not refrain from doing the work, but actually embarks upon it, and undertakes it, and carries it to what we, the defendants, regard as a conclusion." Then it is said, and said as a matter of law, that a duty arises on their part to exercise reasonable care in the way in which they do the work, so as not to injure and damage the plaintiffs, or cause the plaintiffs injury and damage. It is then asserted that in truth and in fact, on the facts and the evidence, it is established that, by reason of the way in which the defendants undertook this work, they did in fact fail in their duty to do it with reasonable skill and reasonable care so as not to injure the plaintiffs.

On the other side, it is said for the defendants that what is complained of here against the defendants does not amount to such a positive act of negligence creating a wrong towards the plaintiffs as would make the defendants liable. All that the complaint amounts to is that there was a failure by the defendants sufficiently to exercise the powers which they had. In other words, to put it in language which we lawyers are prone to think we understand : it was not an act of misfeasance on the part of the defendants. They say : " When you examine the evidence, it was an act of mere non-feasance, and for that we cannot be held responsible at law." Of course, although that distinction sounds attractive in the ears of a lawyer, when one endeavours to apply it to the facts of a particular case, it becomes, on a closer acquaintance, much less definitive than at first sight one had fondly supposed. That that is so is plain from the argument in this case, and is plain if one looks at the judgments which are always under discussion where that problem arises, and which were under discussion in the *Cawdle Fen* case (5), decided by DU PARCQ, J. The matter was also the subject of a long and very close analysis by SCRUTTON, L.J., in *Sheppard v. Glossop Corpn.* (7). Let us see, however, whether or not those cases really support the view that the plaintiffs here, owing to what was done, have a cause of action against the defendants on their assertion that what was done was done without reasonable skill or care to safeguard the plaintiffs against injury and further injury. This topic always leads one to turn first of all to the language of LORD BLACKBURN in *Geddis v. Bann Reservoir Proprietors* (8), at pp. 455, 456 :

... I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone ; but an action does lie for doing that which the legislature has authorised, if it be done negligently.

And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law.

Then there was cited to me (as there was cited to DU PARCQ, J., of course) A a passage from the judgment of LUSH, J., in *McClelland v. Manchester Corpn.* (9), at p. 127 :

If a highway authority, therefore, leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damage ensues. But this doctrine has no application to a case where the road authority have done something, made up or altered or diverted a highway, and have omitted some B precaution, which, if taken, would have made the work done safe instead of dangerous. You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was non-feasance. Once establish that the local authority did something to the road, and the case is removed from the category of non-feasance. If the work was imperfect and incomplete, it becomes a case of misfeasance and not non-feasance, although damage was caused by an omission to do something that ought C to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all.

That appears to me to be a clear indication of the line of distinction D between the case where a matter is one merely of non-feasance and that where the matter is one of actual misfeasance.

If the matter stood there, and if that were a statement of law clearly to be accepted, the matter would not be hedged about with difficulties. Those statements which I have just quoted, however, were again discussed in *Sheppard v. Glossop Corpn.* (7). SCRUTTON, L.J., said, at E p. 145 :

Great reliance was placed on the words of LORD BLACKBURN in *Geddis v. Bann Reservoir Proprietors* (8) [p. 455]: "... an action does lie for doing that which the legislature has authorised, if it be done negligently." The argument, which here followed the letter rather than the spirit of that passage, was this : The appellants F were doing that which the legislature authorised—namely, lighting ; they were doing that negligently when they turned out a light in a dangerous place. That argument takes LORD BLACKBURN's words as meaning, not only does an action lie for doing that which the legislature has authorised if the doing is negligent ; an action also lies for abstaining from doing that which the legislature has authorised, if the abstaining is negligent. But it is not negligent to abstain from doing a thing unless there is some duty to do it. The argument in truth assumes a duty upon the appellants to light. If there is no duty to light there is no negligence in abstaining G from lighting. LORD BLACKBURN's words are addressed to negligence in the direct operation of the powers conferred and undertaken

Then SCRUTTON, L.J., gives instances, and there, if I may say so with great respect, there appears to me again to be emphasised the true distinction which LUSH, J., has emphasised, and which, I venture to say, H LORD BLACKBURN was meaning also to emphasise. Once work is undertaken by an authority under a permissive statutory power, and once that work is done in a way which results in injury, the person who is injured can recover if he can show that, when the authority was actually doing the work, it did it without reasonable care, and thereby caused the injury of which complaint is made. That person can make that

complaint, although it is true to say that the way in which the authority was negligent in doing its work was that it omitted something. For example, there is *Penny v. Wimbledon Urban Council* (10), where the urban district council had delegated—to a contractor, it is true—the work of repairing the highway, and the contractor had made large heaps of material which he had left unlighted on the highway. The negligence for which the urban district council was held liable was the negligence of that contractor. The council could not escape, it was held, on the basis that he was an independent contractor. I am speaking without reference to the case, and from recollection, but it was held that the council was responsible for the negligence from the result of which the plaintiff suffered. The negligence from the result of which he suffered was an act of omission, and it was an act of omission coupled with an act of commission. The council created the heaps and then failed to light them. SCRUTTON, L.J., said in *Sheppard's* case (7), at p. 145 :

LORD BLACKBURN's words are addressed to negligence in the direct operation of the powers conferred and undertaken ; for instance if the appellants chose to light by electricity and laid defective wires near to the main gas pipes in their district and so caused an explosion, that would be a negligent exercise of their powers ; or if they placed a refuge in a crowded street and omitted to light it properly, that might be doing negligently that which the legislature authorised.

I think that that last example does assist to make the matter clear to the extent that, once they have undertaken the work, there is imposed upon them a duty, and a duty to do the work with reasonable care, and not, by reason of the way in which they do it, to injure persons who are in such proximate relation to them, in the circumstances, that they may reasonably be expected to be injured if the work is done without reasonable care. They can be guilty of a breach of duty, once that duty is placed upon them, by omission as well as by commission, and I do not think that that really differs from exactly what DU PARCQ, J., was saying, when, in the *Cawdle Fen* case (5), after looking through these very same cases and passages, he said, at p. 69 :

If an authority is authorised to do something, it is no defence, as I have said, if somebody else is injured by the way in which it does the acts, because they have been negligently performed, to say : " I was only doing what I was entitled to do." Here, what is complained of is, in substance, a failure to do what there was power and authority to do, not by someone who says, " You did it in such a way that I was injured by your doing it," but by someone who says : " Having these powers which you were entitled to exercise for my benefit, either you have not exercised them at all or you have inadequately exercised them." It may be, for instance, that, if the authority, with the intention of clearing away water, were to use some sort of pump which, instead of clearing away water, deposited the greater part of it, because it was negligently worked or designed, on the land of one particular landowner, they would be liable, because he would be entitled to say that they had no business to use their powers in a negligent way affecting him.

In those circumstances, I turn to see the conclusions to which I come on the facts here. At the outset of this case, after consideration, I allowed amendments which added further allegations of negligence against the defendants. As a result of that amendment we have had evidence that the defendants negligently adopted at the outset a method or system of work for closing this breach which was unskilful, and a

- negligent method, inasmuch as, in the circumstances in which the matter fell to be dealt with, it could not have succeeded within a reasonable time, whereas there was available an alternative method, which could have succeeded in reasonable time, and which could have prevented most, if not all, of the damage which has been done to the land occupied
- A** by the one plaintiff and owned by the other. The circumstances, in outline, were these. There was a breach 20 ft. to 30 ft. wide where the old wall had been washed away, and one of the great dangers was that, with the flow of the tide into, and the drainage of the water out of, the marsh, as long as the breach existed, the foundation of the wall would
- B** be washed away. At that particular spot, the salting where the wall was situated was, neglecting for the moment a certain rough kind of turf to be found on the very surface of the salting, composed of about 4 ft. of plastic clay, of a wettish nature. Below that, there was a certain depth of vegetable matter in the nature of a poor quality of peat. On
- C** Dec. 2, there was, as I have said, 22 breaches on this river, and Mr. Clark knew that this breach must be closed quickly. If it was not closed quickly, damage would be done, and the damage would increase, and fresh damage would be done every day and every tide to the marshes at Hemley Hall.
- D** Mr. Clark knew that there was likely to be a difficulty in getting labour, and he knew that, not only was there likely to be difficulty, but also there was no labour experienced in this sort of work to be had, and such labour as he could get would be unskilled labour. When he told Studd
- E** his scheme—namely, that they should drive close piling across at a width of 9 ft., forming a double row of piles, with a space in between 5 ft. wide, and fill that with bags, and try to drive a dam straight across the breach—Studd told him at once that he was completely inexperienced in piling. Notwithstanding that, and notwithstanding that Mr. Clark knew that speed was everything, he embarked upon this
- F** work. There was an alternative method, but, at the moment, quite apart from whether or not going direct across was the right way, I am considering—even assuming for a moment that it had been a way which might have had a reasonable prospect of success in suitable circumstances—whether or not, in all the circumstances in which it was
- G** undertaken, it was a way which had a reasonable prospect of success. It was admitted that, if one adopted that method, one required efficient men, experienced men, and a sufficient number of men, and needed, moreover, a sufficient number of men, when getting across on the last tide, to make what was called a mass attack on the last space left over,
- H** with a view to rushing the dam across and beating the tide before it returned. Having regard to the urgency of the matter, and since time was of the essence of the matter if the plaintiffs' lands were to be saved from injury, and if injury was not to be done to the plaintiffs' lands by further flooding, was it, in all the circumstances, a reasonably skilful method to adopt, just going straight across in the way I have indicated ?

Where the tide had flowed through the breach, already at the outset, through the scouring of the water into and out of the marsh, a hole about 7 ft. across and 4 ft. deep at the deepest point was formed. It lay in the opening, and they had to go across it. Then it was apparent also that a direct method had to go right across that, and through that hole. It was then found that, when they came to drive piles of only 12 ft. in length, they were met by the buoyancy of the pile, the resistance of the water, and the lack of a firm bottom in the pool into which to drive the pile. That was due to going direct across this hole, and the consequence was that, when they had got a little way across, the work was washed out. One consequence of trying the direct method was that, as they were filling the space between the piles with bags and making a solid dam as they went across the hole, each tide flowed through an ever-lessening gap, the effect of which, as one lessened the gap, was just the same as it is when one restricts the flow of water through the end of a pipe. When one contracts the end of a hose-pipe, the force of the flow of water through the end is increased, just as a nozzle increases the force of flow of water in a pipe. The consequence of that increased pressure of water flowing in and out through the decreasing gap was further to scour out and deepen and enlarge this hole, and the consequence of that was that after each effort there was a worse hole to deal with, and a worse set of foundations (if I may use that expression) for any piling that went through the hole. This was all, I think, to be reasonably expected by a reasonably skilful surveyor looking at the site on the first occasion. I do not think that it requires very great skill or knowledge to anticipate that that would be the result of going across by the direct route. There was a seaward or salting side of this wall, and there always had been a dyke which ran across the front of the wall where this breach had occurred, and it was said to be of various estimated widths and depths. That it was of some not inconsiderable width I am satisfied, but I am satisfied that it was a dyke which was shoaling rapidly when it got to this spot, because it ceased altogether to exist when it got further to the southward near to the hard which is indicated on the ordnance sheet, and came to a dead end. It was not by any means, in my view, on the evidence, a serious impediment. To go across that with a dam, as part of a V-shaped dam thrown out on the salting, was, I am convinced, from the outset, and at the outset more particularly, nothing like as difficult as going through the newly-washed-out hole in the gap would be. The dyke had existed, I suppose, for a very long time, and to throw a dam across that, when eventually that method was adopted by Mr. Clark with 22 men, took him only two shifts of $7\frac{1}{2}$ hours. In my view, at the outset, Mr. Clark began with what was to be considered in law, therefore, a negligent method of going across this gap. That method of going across it directly resulted in certain things which were injurious to the plaintiffs, and which were the cause of direct damage suffered by them. For the reasons I have given, it resulted in this hole in the sill of the breach increasing in

size from one which was about 6 ft. wide, and perhaps 4 ft. deep at the most, to one which was finally 19 ft. wide by 12 ft. deep, and which constituted a very troublesome and serious state of affairs with which to deal. That hole remains injurious to the plaintiffs, and will involve the owners of the land in actual loss and expense in filling it up.

A What was the next thing? The next thing was that, having undertaken a way which had only the remotest possibility of success (for he was undertaking it, as I have said, in circumstances where he knew that his men were unskilled, and were insufficient in numbers, and he had no appliances there, such as pile-drivers or mechanical appliances, to assist in the speeding up of the work, or in its more efficient performance), that course was persisted in. With regard to the first effort, the work was washed out somewhere about Dec. 15 or Dec. 16, and was partly destroyed. The men carried on again, still trying the same method, until Christmas, when Studd, with his few men, had almost succeeded in getting across.

C On Christmas Day, however, when he had to go only about 9 ft. to get across, the material washed out again. After Christmas, Studd left, and Barker, an ordinary labourer—within certain limits, of course, a very suitable man for foreman, but having no skilled experience in this type of work, being only a general labourer—was appointed foreman of this job. They then set about the work again, and by Jan. 12, when they had got to the deeper part of the hole, their work, as might reasonably have been expected, washed out again. They then tried once more, and got across in about 3 weeks, by about Feb. 3. Then, again at the deeper end, where the hole was deeper, the work blew out. By “blew out” I mean, of course, that the work was lifted upwards by the action of the tide and the water and the material was thrown away. We have been shown in evidence the line of the three dams made, the line of the first one plotted in violet, the second in green, and the third in red. The third time they went out of the line a little bit, and out towards the saltings towards the creek. At the attempt, which was begun about Feb. 5 or Feb. 6, the piling was carried a certain distance, and they filled in the space between the piles again with the bags of clay. Then at the southern end, where I rather gather from the evidence that they had got past the edge of this hole or pool, and could work with the surface of the saltings as a foundation, Mr. Clark tried the method of building the wall on the saltings without retaining lines of piles on either side of it. He built what was like a sandbag wall, only the bags were filled with this clay. He got across with the wall at that end, but, owing to the facts that the bags were very slippery, because they were filled with clay, and that the men had not built the base of the wall wide enough, the water washed it down again.

H

What was the right way? It has been shown that, if that was a negligent way, there was a right way. As I have said, I think that the evidence both of Mr. Mitchell and of Mr. Smith shows that there was. Moreover, what the defendants finally did was really to elaborate the

idea which underlies what has always been asserted in this case as being the right way to go about this work. Finally, after the third attempt to go across the gap by the direct method had failed, when a hole of these very considerable dimensions had been made, the defendants decided to go right out across the creek on the north side of the breach, right out round on the saltings, building a dam out there, and coming back on the return, which would bring them to the wall on the south side of the breach. The proper way of doing this—a reasonably skilful way, and the way in which it should have been done from the outset if the work was to be undertaken—was to go out on to the saltings, across the creek close to the north side of the breach, over the saltings, make the dam, and strain every nerve to get the dam done rapidly, so as to exclude the tides from the breach, and so as to enable the men then to get to work in the breach, fill such hole as there was there, bring it up so as to form a foundation for the new wall to be thrown across the old line, and then build up the wall in the old line. The result of the repeated attempts to go across by the direct method was, as I have said, that the hole in the sill was made larger and deeper. Not only that, but the breach itself was continually made wider by this method which was being adopted. That again seems to me to be a direct result of the negligent way (as I hold it was) of setting about the work and doing the work that the defendants undertook and did. The breach began by being a 30 ft. breach, but when the defendants had finished on this site it was a 65 ft. breach in the wall. In truth, when left by the defendants, it was more than that, but I have not allowed the plaintiffs to make a specific head of claim and complaint of what I am about to mention, because they had never done so in the pleadings before. When, finally, the defendants resolved to build the dam across the little creek and round by the marsh so as to make a dam round this breach on a foundation which would be a suitable and sufficient one, they resolved to facilitate this operation, as I see by a minute, by destroying a part of the plaintiffs' wall on the north side of this breach and using the material which they could dig from that wall as material for making up their dam or wall which they were throwing out in this way. In truth, something like 35 ft. of the old wall which was standing there, and was perfectly good, has been dug away by them and used as material for filling up and making their new wall. As I have said, I have not allowed it, owing to the late stage at which it arose, but it has been made a specific subject of complaint in this action. I refused to allow the amendment, but I cannot help commenting upon it, because it is, perhaps, indicative of the way in which the work was regarded, and the way in which the defendants were prepared to act in the exercise of their powers.

The result of these efforts being made to go the wrong way was to increase the damage at the breach itself by way of making the hole wider and deeper, and to increase the width of the breach itself. However, there was another, and a direct, injurious result to the plaintiffs through

this method of doing the work being adopted, and as a result of the way in which the work was done—namely, with each washout of the work—there were thrown upon the land behind this breach large quantities of the material, in the way of bags of clay and piles, that had been used in the dam to get across the breach. The final result has been that there

A remains to this day something like $2\frac{1}{2}$ acres of land which is strewn with débris deposited on the land of the plaintiffs, and clogging and fouling the land which the farmer plaintiff occupies. I am satisfied on the evidence that, if the right method had been adopted, with efficient men, and sufficient numbers of men, and adequate materials, that breach might

B have been closed and the dam formed—and I put this as the outside figure on the evidence—within 14 days. It was not until the defendants adopted the method of going out and building the semi-circular wall which they built and which was merely a temporary dam, to be regarded as such, that they ever had a gang of men in numbers anything like 24

C or 25.

I think that this was not a mere case of non-feasance. It was not a mere failure to exercise their powers. They exercised them, and, on this last matter I have been discussing, they exercised them negligently. One of the results of the negligence was undue delay, and unnecessary

D delay, before that breach was closed to the tides. I think that each day after the 14 days that their negligent methods persisted, enabling the flooding to take place on that land with each tide, and to do damage, they inflicted upon the plaintiffs fresh damage and injury. It has not been argued before me, nor is it pleaded, but I am not sure that it does not

E follow that, if it was through their negligence that this land was strewn with their sacks, ever since then their material on the land has been a trespass to the plaintiffs' land, and any damage which it does there is a further danger which results from the continuing trespass. I have not heard the point argued, but, of course, it was a point which was dealt

F with, as I happen to remember, in *Konskier v. Goodman (B.), Ltd.* (11). However, that is not the ground on which I decide that the defendants are responsible. I have said that they are responsible in the circumstances which I have endeavoured to state.

Solicitors: *J. R. Welch, Son & Algar*, agents for *Turner, Martin & Symes*, Ipswich (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *Cobbold, Sons & Menneer*, Ipswich (for the defendants).

[Reported by CHARLES NEWTON, ESQ., Barrister-at-Law.]

WALLINGTON v. TOWNSEND.

H

[CHANCERY DIVISION (Morton, J.), **February 3, 6, 7, 8, 1939.**]

Sale of Land—Agreement for sale—Inaccurate plan annexed to contract—Rectification—Damages for loss of bargain.

The defendant, the owner of adjoining freehold bungalows known as "Seaspray East" and "Seaspray West," under a contract dated May 17, 1937, agreed to sell "Seaspray East" to the plaintiff for £925.

A plan referred to in a schedule showed the boundary of "Seaspray East" on the side of "Seaspray West" as a line running north and south. At some date subsequent to July, 1929, the defendant had removed the dividing wall between the bungalows, and had occupied both bungalows as one. In Nov., 1932, they were again divided, and a strip of land measuring 27 ft. by 2 ft. 6 ins., formerly part of "Seaspray East," was included in the land belonging to "Seaspray West." A new partition was built on the added strip of land, and part of the enclosed strip was used to build a bathroom and lavatory for "Seaspray West," and to lay drains. The boundary along its whole length no longer ran north and south. Prior to the contract, the plaintiff had inspected the property, and she saw the strip of land which had been added. The defendant's solicitors, being unaware of the alteration to the properties, annexed to the schedule to the contract for sale a plan which was an exact copy of one in a previous conveyance of the property, dated Oct., 1922, showing the boundary between the properties as it then existed, but the conveyance of the property which was subsequently prepared showed the boundary between the two properties in its true position when the matter thus came to the notice of the plaintiff's solicitors. The plaintiff instituted proceedings for repayment of her deposit and for the recovery of certain damages. The defendant contended that, on its true construction, the contract did not include the strip of land formerly part of "Seaspray East," and counter-claimed alternatively for rectification. The defendant further contended that, as the plaintiff had not completed by the date fixed for completion, the deposit was forfeited:—

HELD: (i) from the wording of the contract of June 8, 1937, the disputed strip was included in the property to be sold.

(ii) the defendant did not intend to sell, but the plaintiff did intend to buy, part of the disputed strip. The defendant had failed to discharge the burden resting on her, and had failed to establish the facts necessary for rectification.

(iii) there was an agreement here to postpone completion, and a waiver of any right which the defendant might have had to insist on completion on June 22, the date fixed.

(iv) the defendant had refused to perform what had been held to be the contract, but the plaintiff had not adduced evidence of damage caused by the loss of her bargain.

[EDITORIAL NOTE.] The present case deals fully with the questions arising on the inclusion of an inaccurate plan in a contract for sale of real property. The law on the right of a disappointed purchaser to damages for loss of bargain is also considered. In the present case, the purchaser was not awarded such damages, but obtained the return of the deposit and a sum equal to her conveyancing cost as damages.

AS TO DAMAGES FOR LOSS OF BARGAIN, see HALSBURY, Hailsham Edn., Vol. 29, pp. 389-394, paras. 535-541; and FOR CASES, see DIGEST, Vol. 40, pp. 258-268, Nos. 2242-2350.]

Cases referred to:

- (1) *Eastwood v. Ashton*, [1913] 2 Ch. 39; 40 Digest 335, 2838; 82 L.J.Ch. 313; 108 L.T. 759; *revsd.*, [1914] 1 Ch. 68; *resd.*, [1915] A.C. 900.
- (2) *Baendele v. Seale* (1855), 19 Beav. 601; 42 Digest 470, 385; 24 L.J.Ch. 385; 24 L.T.O.S. 306.
- (3) *Stickney v. Keeble*, [1915] A.C. 386; 42 Digest 511, 768; 84 L.J.Ch. 259; 112 L.T. 664.
- (4) *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1078; 40 Digest 262, 2273.
- (5) *Bain v. Fothergill* (1874), L.R. 7 H.L. 158; 40 Digest 265, 2306; 43 L.J.Ex. 243; 31 L.T. 387; *affg.* (1870), L.R. 6 Exch. 59.

(6) *Re Daniel, Daniel v. Vassall*, [1917] 2 Ch. 405; 40 Digest 264, 2287; 87 L.J.Ch. 69; 117 L.T. 472.

(7) *Engell v. Fitch* (1869), L.R. 4 Q.B. 659; 40 Digest 263, 2284; 38 L.J.Q.B. 304.

A ACTION by the plaintiff (i) for a declaration that, by reason of the breach of contract for sale by the defendant to her of the property in question, she was entitled to the repayment of her deposit of £92 10s., and (ii) for damages for breach of the contract, including interest on the deposit at 4 per cent. per annum from May 17, 1937.

Lionel L. Cohen, K.C., and *J. G. Craufurd* for the plaintiff.

E. M. Winterbotham for the defendant.

B *Winterbotham* : In a case where there are parcels and a plan, one must take the whole thing together, except where there is a very precise description. They are for identifying the property. Regard must be paid to the evidence as to the physical condition of the property at the time—
C that is, what “Seaspray East” consisted of. The agreement is not one to sell any land upon which “Seaspray West” stood, or one to sell any land within its curtilage. The defendant did not intend to sell the strip inside or outside these bungalows. The purpose of the
D erection of a fence like this must be to show the intention of the owner as to the way in which the properties should be separately occupied. The evidence shows that the plaintiff’s intention was to buy the property as it stood, as she saw it when she inspected it. Completion must take place within the time fixed. The contract here is dated June 8, and completion was fixed for June 22.
E The purchaser here had not performed her obligations to complete on June 22, and, therefore, her deposit would have been forfeited. [Counsel referred to *Stickney v. Keeble* (3), *Baxendale v. Seale* (2), *Engell v. Fitch* (7) and *Re Daniel, Daniel v. Vassall* (6).]

F *Cohen, K.C.* : Even without a reference to the plan, there is not an exact description of the property at all, and, therefore, a reference to the plan is essential. With regard to rectification, the onus here is on the defendant. The material date is June 8, the date of the contract, and not the date when Mrs. Wallington went over the house. Assuming time to be of the essence of the contract, the parties may extend it.
G There are letters here showing that the time for completion was extended. Where failure to complete is due to a wilful refusal to complete by the defendant, the plaintiff can recover his deposit, with interest, and costs thrown away, such as the expenses of investigating his title. It is not so clear whether or not he can recover damages for the loss of his bargain,
H but, if he is awarded the latter, he cannot recover the former. [Counsel referred to *Engell v. Fitch* (7), *Bain v. Fothergill* (5) and *MAYNE ON DAMAGES*, 10th Edn., p. 197.]

Winterbotham : Damages for breach of contract are awarded, not as a punishment, but as compensation. [Counsel referred to *Bain v. Fothergill* (5).]

MORTON, J. : This action arises out of a contract in writing, dated June 8, 1937, whereby the defendant, Mrs. Bertha Townsend, agreed to sell to the plaintiff, Mrs. Charlotte Jane Wallington, for the sum of £925 certain property at Shoreham-by-Sea, in the county of Sussex : "together with all furniture, fixtures and fittings thereon and therein." The case is a good illustration of the fact that actions in which the subject-matter is comparatively trifling often give rise to the most difficult questions of fact and of law. A

I think that there are four questions which I have to decide—namely, (i) what does the contract include on its true construction ? (ii) if the plaintiff's construction of the contract is correct, ought it to be rectified so as to give effect to what was, according to the defendant, the true common intention of the parties ? (iii) if the plaintiff's construction is right, and the defendant fails to prove the necessary facts leading to rectification, is the plaintiff disentitled to damages because she failed to complete on the date for completion fixed by the contract ? (iv) assuming that the defendant is entitled to damages, what is the proper measure of those damages ? B C

I propose, first of all, to state the history of the case, without attempting for the moment to disintegrate the evidence which is admissible on the question of construction from the evidence which is admissible on the question of rectification. The history starts with a conveyance of Aug. 14, 1914. The property in question in this action is a bungalow known as "Seaspray East." The conveyance of Aug. 14, 1914, which was made between Freehold Dwellings, Ltd., of the first part, and London County and Westminster Bank, Ltd., of the second part, and George Ashton, of the third part, was a conveyance unto and to the use of Mr. Ashton in fee simple of a piece of land which is described as follows : D E

All that piece of land situate on the south side of the Norfolk Bridge Road Shoreham in the county of Sussex near the full of the beach and near groyne 15a together with the bungalow called "Seaspray" now standing thereon formerly forming part of the estate of the Shoreham and Lancing Land Co., Ltd., as the same is more particularly delineated on the plan drawn on these presents and thereon coloured pink . . . F

I do not think that I need read the rest of the description. It therefore appears that at that date one bungalow, known as "Seaspray," had been erected upon this piece of land. What the appearance of it was I do not know, because I have no evidence on the subject. The next document is a conveyance of Nov. 26, 1920, made between Herbert Lloyd Fox, of the one part, and Elsie Annie Potter, of the other part. By that conveyance, Mr. Fox conveyed to Miss Potter, putting it shortly, the land and bungalow which had been conveyed by the conveyance of Aug. 14, 1914, and which was conveyed by reference to the plan of that conveyance, although the conveyance was erroneously referred to as being a conveyance of Aug. 14, 1911. It would appear that Miss Potter divided "Seaspray" into two bungalows, one known as "Seaspray G H

East" and the other known as "Seaspray West," because on Oct 7, 1922, Miss Potter conveyed to the defendant in this action :

... all that piece of land situate on the south side of the Norfolk Bridge Road Shoreham-on-Sea in the county of Sussex near the full of the beach and groyne 15a together with the bungalow called "Seaspray East" now standing thereon formerly part of the estate of the Shoreham and Lancing Land Co., Ltd., as the same is more particularly delineated on the plan drawn hereon and thereon coloured pink ...

The plan, which is a plan of some importance in the present case, shows the outline of the bungalow "Seaspray East" on the land coloured pink, and also shows merely by the words "Seaspray West" that on the west side of the pink land there were premises known as "Seaspray West." On July 27, 1929, Mr. Stilgoe conveyed to the defendant :

... all that piece of land situate on the south side of Norfolk Bridge Road Shoreham-by-Sea in the county of Sussex near to the full of the beach and near groyne 15a on which the western portion of the bungalow known as "Seaspray" now stands ...

Then it is defined by reference to the plan on a certain conveyance on sale.

On getting both plots into her ownership, Mrs. Townsend instructed Mr. Gammans, an architect and surveyor, who gave evidence before me, to pull down the buildings which were then on the west portion of the land and rebuild them, thus making the property once more into one bungalow. This was done by Mr. Gammans, and the result of his work is shown on the plan tendered in evidence. Thereafter, Mrs. Townsend and her husband lived in the bungalow until about Nov., 1932, but in or about Nov., 1932, Mr. Gammans carried out certain alterations in the property and made the property into two bungalows. It is by reason of these alterations, and of certain other events to which I shall have to refer, that the trouble arises in the present action.

The alterations may be described thus. An opening which previously existed between the lounge of "Seaspray West," the western portion, and the whole of the eastern portion was filled in. There is some conflict of evidence between two professional gentlemen who were called as to whether that portion was filled in by a wall which continued the existing wall of the lounge in a straight line or whether it was some 6 ins. further to the west. However, I do not think that anything turns upon that, in the view of the case which I take. Then a bathroom and water-closet were put in for the convenience of the occupants of "Seaspray West," which was to be a separate bungalow. These two rooms were constructed by taking a certain amount of space from what had formerly been a conservatory in "Seaspray West" and also taking out of the entrance hall of "Seaspray East" a space of about 2 ft. 6 ins., the result being that the bathroom and the water-closet both projected under the roof of "Seaspray East," that roof being quite a different one from that of "Seaspray West." The roof of "Seaspray East" is a corrugated iron roof, while the roof of "Seaspray West" is made of some species of tiles. As regards the outside of the premises, a low fence was erected, which ran due north from the corner of the new water-closet down to a point rather

beyond the north wall of the kitchen of "Seaspray West." It then ran about 2 ft. 6 ins. to the west and then in approximately a straight line due north to the boundary at the roadside. The result of that was the formation of a strip about 2 ft. 6 ins. wide, which included a portion of the bathroom of "Seaspray West," a portion of the water-closet of "Seaspray West," and the outside strip to which I have referred. The outside strip had in it a coal-box, which was in fact used in conjunction with "Seaspray West," and the drains leading from the new installations in "Seaspray West." These drains ran down to an inspection chamber, which was situated in the outside part of this strip. I shall hereafter refer to this strip as the disputed strip, as it is the cause of the dispute in this action. It is to be observed that the disputed strip is partly under the corrugated iron roof to which I have referred and partly in the open air. The construction of the bungalow, according to Mr. Gamman's evidence, is such that the internal walls are 6 ins. thick. They are made of timber frames, with fire-resisting material on each side, and the outside wall of the bathroom and water-closet is weatherboarded. The only entrance to the outer portion of the disputed strip, unless one steps over the fence, is from the garden of "Seaspray West."

After these alterations had been made, Mr. and Mrs. Townsend went to live in another house. From time to time they occupied either "Seaspray East" or "Seaspray West," but they frequently let them separately, the bungalow let as "Seaspray West" including, of course, the bathroom and water-closet to which I have referred. On May 15, 1937, which is an important date in this case, there was no one living at "Seaspray West," but "Seaspray East" was occupied by a family. On that day, the dustbin which was in use for "Seaspray East" was in fact placed on the outer portion of the disputed strip behind the coal-box.

I now turn to the correspondence, because I can conveniently recite the history of the case by reference to it. It appears from a letter of May 11 that Mr. Townsend, who was in the habit of managing his wife's property for her, put "Seaspray East" and "Seaspray West" into the hands of Mr. Leggett to let or sell. In the evidence particulars appear both of "Seaspray East" and of "Seaspray West." As regards the particulars of "Seaspray East," it is to be noted that there was stated to be a bathroom, with geyser, and a lavatory. There was in fact a bathroom with geyser and a lavatory in "Seaspray East," but only one. Also, by some error "Seaspray East" was stated to have a small greenhouse. How that arose I do not know, because there was in fact no greenhouse in "Seaspray East." The price at which the property was for sale was stated as £850, and there were certain particulars given of what will be expected for letting by the week. The particulars of "Seaspray East" throw no light at all upon the external boundaries of the properties. When I turn to "Seaspray West," it is to be observed that it is stated to contain a bathroom, with hand-basin and a separate lavatory, and also a garden with garage.

It is established by the evidence that on May 15, 1937, the plaintiff, Mrs. Wallington, and her husband went to Mr. Leggett's office, and that she and her husband went with a Mr. Pitt, an employee of Mr. Leggett's, and inspected "Seaspray East" and "Seaspray West." Mrs. Wallington and her husband were called as witnesses before me, but Mr. Pitt
A was not called by either side. I do not propose to review in detail the evidence as to what took place on that occasion, but I am satisfied that, when the offer was made on that same day (an offer to which I shall refer in a moment), Mr. and Mrs. Wallington—and I should say in particular Mrs. Wallington, as it is her views and intentions that are
B really material—realised quite well that they were not making an offer for any part of the bathroom or water-closet which were at that time a portion of "Seaspray West." They thought at that time that the interior division of the property ran in a straight line. That may seem surprising when one looks at the plan, but they told me that they did
C think that the interior boundary ran in a straight line, and I accept that statement.

As regards the outdoor portion of the disputed strip, if Mr. and Mrs. Wallington had not given evidence, I might have felt inclined to infer that, seeing the fence in the position that it was, seeing, as they should
D have seen, the outside window of the water-closet, the inspection chamber and the water-pipe, they must have thought that, when they made an offer for "Seaspray East," they would not get the external portion of the disputed strip. However, I shall state my views as to this at a later stage in my judgment. It is quite clear, though, that they did not
E think that they were getting any part of the bathroom and the water-closet of "Seaspray West."

On May 15, Messrs. Buckwell and Wallington, the solicitors for the plaintiff, wrote to Mr. Leggett in these terms :

Mrs. Wallington is of the opinion that the bungalow shown to her should include
F the garage within the actual boundaries of the bungalow plot, and another cannot be erected on the remaining frontage. She is therefore prepared to purchase the bungalow and contents as offered at the price of £850, subject to the repairs being completed, the title being satisfactory and to the inclusion of the garage for £925 all in. The purchase to be completed within one month from this date and this offer being accepted by 11 o'clock on Wednesday the 19th instant.

It is to be observed that Mrs. Wallington is offering to purchase "the
G bungalow and contents as offered," and that the heading is "*Re East Bungalow, Shoreham.*" Mrs. Wallington appears to have sent a cheque for the whole amount of the purchase money. On May 17, however, there is a letter from Mr. Leggett to Mrs. Wallington in the following
H terms :

Re "Seaspray East," Shoreham Beach.

We beg to enclose herewith receipt for cheque handed to our Mr. Leggett to-day, and also to return cheque on Barclays Bank, Ltd. . . . for £925, such return cancelling receipt given under date May 15, 1937.

Then there is the receipt in the following terms on May 17, 1937 :

Received of Mrs. C. Wallington cheque for the sum of £92 10s. to be held by us

as stakeholders pending negotiations for the purchase of the bungalow "Seaspray East," Beach Road, Shoreham Beach, for the sum of £925 to include garage, subject to contract. This receipt for £925 dated May 15, 1937, refunded. Property is freehold. £92 10s.

It is quite clear that at this stage there was no contract between the parties. Mr. Leggett then got in touch with Messrs. Coleman & Co., the country solicitors acting for the defendant. On May 19, Mr. Leggett wrote to Mr. Wallington "*Re 'Seaspray East,'*" and said that his client :

. . . is prepared to accept your offer of £925 for the above property, including the furniture as it stands, and including the garage on the north side of the bungalow. Messrs. G. Coleman & Co., of 33, Waterloo Street, Brighton, will be acting for the vendor and we asked them to send you draft contract as soon as possible, made out to Mrs. Wallington. With regard to the contents of the bungalow, do you wish us to prepare an inventory of this, if so, we shall be pleased to do this for you. the charge for which will be £1 1s.

Then in the next letter of May 19 Messrs. Coleman & Co. say that they have written to Mr. Townsend for the deeds and will send on the draft contract as soon as they are received. Messrs. Coleman & Co. then got in touch with Messrs. Buckwell & Wallington, and wrote on May 21 in the following terms :

"Seaspray East," Shoreham-by-Sea.

We have received instructions to act for Mrs. B. Townsend on her sale of the above-mentioned property and understand that you will be acting for the purchaser. We accordingly send herewith the draft contract with a carbon copy for your use and an abstract giving particulars of the deeds containing details of the restrictive covenants.

It is common ground that that contract had attached to it a plan, but most unfortunately that plan was an exact copy of the plan on the conveyance of Oct. 7, 1922, showing a perfectly straight boundary between "Seaspray East" and "Seaspray West." It is common ground that, owing to the alterations which had been carried out in Nov., 1932, the line of that western boundary of "Seaspray East" would include as part of "Seaspray East" the outdoor portion of the disputed strip, and also a portion of the bathroom of "Seaspray West" and a portion of the water-closet of "Seaspray West." The explanation of the matter is this. Mr. Coleman was not aware that alterations had been carried out in the bungalows. He observed from the conveyance of 1922 that at that time the property had been divided into two, and he assumed that the boundary was still the same in 1937 as it was in 1922, and he therefore sent this plan.

There is a comment to be made at this point. The plan, as I have said, shows the straight boundary. Mr. and Mrs. Wallington were under the impression that the interior division of the two bungalows was a straight line. In my view, they were also under the impression that they were to get the outdoor portion of the disputed strip. Therefore, it fitted in well with their view of the matter when they saw that there was a straight line along the western boundary. It certainly did not draw their attention to any doubt which there might be in the matter.

Messrs. Buckwell & Wallington sent to Messrs. Coleman & Co. some inquiries arising on the draft contract, and one of them is strongly relied

upon by Mr. Winterbotham for the defendant in this action. That inquiry was No. 5, and it and the answer to it are in the following terms :

Is there any liability for the repair or maintenance of anything used in common by the owner or occupier of the property or the owner or occupier of the neighbouring property ?—Probably the fencing at the side. We suggest that the wall and fence dividing the property from "Seaspray West" be declared a party wall and fence.

- A If Mr. Coleman had known the actual physical division of the property, I think that that might have been a very significant answer, because it does suggest that there is the wall and fence dividing the property. There is no suggestion that they are going to be removed, or that the
B fence is going to be straightened in any way, and it might have had considerable significance. In fact, however, as we know from his evidence, Mr. Coleman did not know that the fence ran otherwise than in a straight line, and, as for the recipient of this reply, Mr. Wallington also was under the impression that the boundary was a straight line. I do not
C think that I can attach very much importance to that answer, in the circumstances in which it was given.

The draft contract was approved by Messrs. Coleman & Co. by letter of June 2, and it was agreed that two weeks from the date of the contract should be the date of completion. On June 8, Messrs.
D Coleman & Co. wrote to Messrs. Buckwell & Wallington in the following terms :

We thank you for your letter of the 7th instant enclosing the contract relating to the above-mentioned property. In fact you did not date your part of the contract, but we have inserted to-day's date therein and the 22nd instant as the date for completion. If further time is required by you for completion we shall be prepared to advise our client to grant it in view of the fact the completion is fixed for so early
E a date.

That may be a passage of some materiality, because what it comes to is that they are fixing June 22 as the date for completion, but Messrs. Buckwell & Wallington are told that, if they want further time, it will be granted. The letter then goes on as follows :

- F We now send herewith the contract signed by the vendor together with the remainder of the abstract of title. The abstracted deeds with the exception of the conveyance of Aug. 3, 1911, are in our possession and can be produced at any time on short notice.

- It will be observed that at this stage Mrs. Townsend had signed the
G contract, and it is a lamentable fact that she never read the contract and never looked at the plan before signing the contract. That may not be uncommon in the case of a lady signing business documents, but it is very regrettable indeed in the present case, because I think that, if Mrs. Townsend had taken the trouble even to glance at the plan,
H she would have seen that the straight line bounding the property on the west did not accord with the present form of occupation of the two bungalows. I am quite satisfied that Mrs. Townsend did not intend to sell any part of the disputed strip, either the outside part of it or the interior part of it. Indeed, nobody has suggested the contrary throughout the case. Unfortunately, however, either she did not notice, or else

she did not call attention to, the fact that the boundary was a straight line, which was not in accordance with her real intentions.

The requisitions on title were sent on June 9, and my attention has been called to No. 10, which is as follows :

Under what circumstances was the property divided into two, as the conveyance of Aug. 3, 1911, shows the part simply as "Seaspray" although the part conveyed now is quoted as "Seaspray East" ?

The answer is in the following terms :

It appears that Miss E. A. Potter divided the property and sold "Seaspray East" to the vendor.

That answer was quite correct, according to Mr. Coleman's knowledge of the matter, but unfortunately it is not the whole of the facts. Mr. Coleman did not know the remainder of the facts, the position being, as I have said, that, although Miss Potter divided the property, it was subsequently made into one by Mr. and Mrs. Townsend, and it was subsequently subdivided in a different manner.

The draft conveyance was sent on June 15 by Messrs. Buckwell & Wallington, and was approved on June 16. On June 22, Messrs. Buckwell & Wallington wrote to Messrs. Coleman & Co. in the following terms :

We are now in a position to complete this matter and suggest Friday morning. Will you please let us have a completion statement calculated to Friday 25th ?

P.S. We return conveyance and will give an undertaking on completion to have it signed by the purchaser.

It is to be observed that the date of that letter was June 22, which was the date fixed for completion by the contract. As one would expect, having regard to the earlier letters which I have read, Messrs. Coleman & Co. wrote on June 24 :

We thank you for your letter of the 22nd instant enclosing the conveyance relating to this property. Completion will be quite in order for Friday next and we send the completion statement to you herewith.

P.S. We have seen Mr. Townsend this evening and he informs us that the plan on the conveyance is wrong. Will you give us a ring on the telephone to-morrow and we will discuss the matter ?

The completion statement which they enclosed showed a sum of £833 16s. 4d. to be due. On June 25, Messrs. Coleman & Co. wrote to Messrs. Buckwell & Wallington in the following terms :

"Seaspray East."

We refer to our telephone conversation this morning in regard to the above-mentioned property [a conversation between Mr. Coleman and Mr. Wallington] and have pleasure in confirming that an alteration was made to this property when "Seaspray West" was purchased by Mr. Townsend. It appears that the dividing line between the two bungalows was then varied so that part of the kitchen and lavatory of "Seaspray West" projects about 2 ft. into "Seaspray East" and also part of the passage leading to the "Seaspray West" kitchen also extends over part of "Seaspray East."

The reference to the passage leading to "the 'Seaspray West' kitchen" was a mistaken one. The letter goes on :

Mr. Townsend left with us a sketch showing the present position and we send a copy of the same to you herewith.

I have seen that sketch. It does not purport to do more than give an indication of the nature of the difficulty, and for that purpose I think that

it is reasonably sufficient. It shows the disputed strip both within and without the house. The letter goes on :

We shall be obliged if you will kindly consider the position but it seems to us that the purchaser must be taken to have bought the property as it stands and that our client is entitled to rectification of the contract. If you agree we will amend the plan on the contract and return it to you for approval and we will then re-engross the conveyance for execution by the purchaser.

There then follow numerous letters which I do not think I need read in detail. They consist to a great extent of discussions as to which side is right, and they contain a number of suggestions for putting an end to the unfortunate dispute which had arisen. They came to nothing, however. No terms were ever agreed, and the result was that this action was brought. The plaintiff issued a writ on June 30, 1937, and followed it up by a statement of claim. The statement of claim in its original form claimed specific performance of the contract of sale of June 8, 1937, and damages, either in lieu of, or in addition to, specific performance, and costs. However, that was subsequently amended, and what the plaintiff now claims is a declaration that, by reason of the breach of the contract for sale by the defendant, the plaintiff is entitled to repayment of the deposit and to certain damages. The defendant contends that, on its true construction, the contract does not include the disputed strip, and counterclaims alternatively for rectification.

The first question, as I have said, is as to the true construction of the contract of June 8, 1937. It is between Mrs. Townsend, of the one part, and Mrs. Wallington, of the other part, and the relevant portions are as follow :

1. The vendor [Mrs. Townsend] hereby agrees to sell and the purchaser agrees to purchase the freehold property shortly described in the schedule hereto for an estate in fee simple absolute in possession free from incumbrances except as hereinafter mentioned at the price of £925 to be paid as follows namely the sum of £92 10s. as a deposit and in part-payment of the purchase money to Messrs. R. A. Leggett of Shoreham-by-Sea in the said county of Sussex as stakeholders before the signing hereof and the balance thereof on the completion of the purchase.

2. The property is sold subject to the Sussex Law Society conditions of sale incorporating the Law Society's conditions of sale 1934 so far as the same are applicable to a sale by private treaty and are not inconsistent herewith and to the special conditions herein contained.

Counsel have not troubled me with either the Sussex Law Society's conditions of sale or the Law Society's conditions of sale, as neither counsel thinks that they have any bearing upon the question which I have to decide. Then in cl. 3 there is a condition as to title which I need not read. Clause 4 provides that the purchase shall be completed on or before June 22, 1937, at the office of the vendor's solicitors. Clause 5 refers to certain restrictive covenants subject to which the property is sold. So far, we have no description of the property, but we are told that it is "shortly described in the schedule hereto." The schedule, omitting certain words which both sides agree are immaterial, is as follows :

All that piece of land situate on the south side of the Norfolk Bridge Road Shoreham-by-Sea in the county of Sussex near the full of the beach and groyne 15a

together with the bungalow called "Seaspray East" and the garage now standing thereon formerly part of the estate of the Shoreham and Lancing Land Co., Ltd., as the same is more particularly delineated on the plan annexed hereto and thereon coloured pink. . . . and together with all furniture fixtures and fittings thereon and therein.

If I give to that contract the construction for which the plaintiff contends, it will have the remarkable result that there is included in the property to be sold the bath belonging to "Seaspray West," a fitting in the adjoining water-closet, and, outside the house, a strip which contains the coal-box of "Seaspray West." That is a construction at which one would prefer not to arrive if it were possible to construe the deed in a different way. In my view of the wording of the deed, however, it is a fact that the disputed strip is included in the property agreed to be sold. The opening words, "All that piece of land situate on the south side," and so on, contain no precise description of what is being sold. We then get the words :

. . . together with the bungalow called "Seaspray East," and the garage now standing thereon . . .

That is not a description of what is being sold. It is a statement of something which is sold, together with the piece of land, which has not yet been described. It does not say that there is nothing else on that piece of land, and I do not think that it can be said that it identifies the precise limits of the property. It then proceeds with the words :

. . . as the same is more precisely delineated on the plan annexed hereto and thereon coloured pink . . .

There, for the first time in this schedule, one gets what appears to be a clear and definite description of the land which is being sold. I think that this is a case in which the only definite description of what is being sold is contained in the plan. The words ". . . together with all furniture fixtures and fittings thereon and therein" cannot, in my view, alter the conclusion to which I have come—namely, that it is the plan which defines that which is sold—even although one may be surprised to find that in fact certain fittings are on that land.

In arriving at this conclusion, I am assisted by *Eastwood v. Ashton* (1), and in particular by an observation of LORD WRENBURY, at p. 920 :

My Lords, I find that the description by plan is couched in the words "all which said premises are more particularly described." The words "more particularly" exclude, I conceive, that they have already been exhaustively described. These words seem to me to mean that the previous description may be insufficient for exact delimitation, and that the plan is to cover all deficiencies, if any.

The result is that I find myself unable to come to any conclusion other than that, on the true construction of the contract, the disputed strip is included in the land contracted to be sold to the plaintiff.

I now come to the question of rectification. It is clearly established that Mrs. Townsend did not intend to sell the disputed strip, and that, so far as she is concerned, it was a mistake that the disputed strip was included in the contract. It is also established that Mr. and Mrs. Walling-

ton, although they thought that the interior line was a straight one, did not intend to buy any part of the bathroom or water-closet of "Seaspray West." In my view, the defendant has failed to discharge the burden resting upon her. If she could have proved that Mrs. Wallington did not intend to buy any part of the disputed strip, having already proved, A as I have held, that she herself did not intend to sell any part of the disputed strip, the claim for rectification would have been well-founded. However, that is not the position. It appears that, while Mrs. Townsend did not intend to sell all that is included in the plan attached to the contract, Mrs. Wallington intended to buy part of the disputed strip, B though she did not, I think, intend to buy the other part. In those circumstances, the facts necessary to make a case for rectification have not been proved. It is now shown that the parties were, *ad idem*, that they had precisely the same intention, and that that intention is not carried out by the contract which they executed. As I have said, I C do not intend to review the evidence in detail. It is sufficient to say that the defendant in this action has failed to establish the facts necessary to justify rectification. In my view, Mrs. Wallington did think that she would get the external portion of the disputed strip, although at first sight it may seem strange that she should have thought so, having D regard to the physical appearance of the property.

The next point is one which is raised by Mr. Winterbotham on behalf of the defendant. He says that, even if the court is against the defendant on the construction of the contract, and against the defendant on the issue of rectification, this is a case in which the court would not decree E specific performance, as there was a mistake on both sides, although it did not happen to be the same mistake, and time is of the essence of the contract, and the plaintiff was out of time as regards completing on June 22, 1937. He refers to *Baxendale v. Seale* (2), and in particular to certain passages at pp. 609, 612, and to *Stickney v. Keeble* (3), at p. 415. He F says that, this being a contract of which the court would not decree specific performance, the matter is governed entirely by common law rules, and time is of the essence of the contract. That is a very interesting point of law, but I do not propose to decide it, because, in my view, it is unnecessary. Let me assume that in this case time was of the essence G of the contract, although I am far from expressing the view that it was, in the circumstances of the case. It seems to me that, in view of the letters which have passed, and which I have read, the defendant is completely precluded from saying that the plaintiff is disentitled to recover, because of the delay from June 22 to June 25, when no doubt H the purchase would have been completed but for the discovery in regard to the plan. I have read the letters in that connection, and in particular the letter of June 8, in which the defendant's solicitors suggest June 22 as the date of completion, and go on to say as follows :

If further time is required by you for completion we shall be prepared to advise our client to grant it in view of the fact that the completion is fixed for so early a date.

That letter was followed by the letter in which the plaintiff's solicitors say that they are in a position to complete and suggest Friday morning, and by that in which Messrs. Coleman & Co. say :

Completion will be quite in order for Friday next.

Even if, at any stage, time were of the essence of the contract, I think that there is there an agreement to postpone completion till June 25 and a waiver of any right which the defendant might otherwise have had to insist on completion on June 22. For this reason, I do not propose to discuss the question as to whether or not, in the circumstances of the present case, time was of the essence of the contract, or would have been of the essence of the contract if those letters had not been written. A B

The last question, which is, I think, one of considerable interest, is what the measure of damages is in this case, the position being that the defendant has refused to perform what I have held to be the contract, that the plaintiff has not adduced any evidence of damage caused by loss of bargain, and that the defendant's failure to carry out the contract was not caused by any defect in the vendor's title. In those circumstances, Mr. Winterbotham, for the defendant, says that the plaintiff is entitled to no damages. He says, and so far I agree with him, that the rule in *Flureau v. Thornhill* (4), which is fully discussed in *Bain v. Fothergill* (5), does not apply to a case where the failure to complete is not due to a defect in the vendor's title. He says then that the vendor cannot recover even the expense to which she has been put, which I think I may conveniently call the conveyancing costs, and that she cannot recover any damages for loss of bargain, for no such damages have been proved. If that proposition were correct, it would lead to certain very curious results. In the first place, if Mr. Winterbotham is right, a vendor of property who is unable to complete owing to a defect in his title—perhaps an unsuspected defect—is in a worse position, from the point of view of damages, than is the vendor who, having a perfectly good title, merely says : “ I will not complete.” That seems to me to be a startling result, and it leads to the further result, as it seems to me, that it would perhaps be an encouragement to a vendor who repented of his bargain to say : “ I shall not carry out this bargain.” It is true that there is always the remedy of specific performance, but, supposing that damages were to be measured, according to Mr. Winterbotham, the damages in such a case as that would be nil. I do not think that that can be the true view. I think that it appears clearly from *Re Daniel, Daniel v. Vassall* (6) that, in cases where the failure to complete is not due to any defect in the vendor's title, damages can be given for loss of bargain. I think that the true view is that damages can be given in such circumstances for loss of bargain, and that, if a purchaser gets such damages, he cannot recover the conveyancing costs also. The reason for that is stated by SARGANT, J., as he then was, at p. 412 : C D E F G H

Weighing one thing with another, I have come to the conclusion that the value

of the property on the whole was very much nearer £1,000 than the sum of £1,500. I put the value at £1,125, and accordingly I allow the company's claim at £125.

That, in his view, was the proper amount of the damages for the loss of the bargain. He goes on, at p. 412 :

A That being so, of course, they cannot have, in addition to the £125, the costs of investigating the title—that is, the £37 odd which the master allowed them. I do not think that was contended for by Mr. Maugham ; and indeed such a claim could not be supported, for this reason, that the basis of the estimate of the loss is the difference between the value of the property if it had been conveyed to them in accordance with the contract and the price given for the property, which difference I have put at £125. If they had had the property conveyed to them, of course they would have had to incur all the expense of investigating the title that they did actually incur. Therefore it is impossible to give them that sum in addition to the sum by way of general damages.

B In those circumstances, is a purchaser who has been deprived of his bargain by the vendor's default, but who cannot say that he has suffered loss by reason of the loss of the bargain, entitled to no damages at all ? I do not think that that is the true view. As appears from the judgment C which I have just read, he cannot have both damages for loss of bargain and his conveyancing costs. In a case such as the present, however, the position is this. The purchaser was willing to pay the conveyancing costs by reason of the fact that she was willing to exchange the £925 in her possession for the property which she wanted. What has happened D is that the vendor has refused to convey that property, and the purchaser, it is true, retains her money. She has not got the property which she wanted, and she has become liable to pay certain expenses. This is not a case where the damage which she could recover is limited to those conveyancing expenses, if she could prove more damage, but, in my E view, she is entitled to recover the conveyancing expenses to which she has been put. I think that it is true to say that, in a case where the vendor under a contract for the sale of land has refused to carry out the contract, and the failure to carry out the contract is not due to a defect in the vendor's title, the damages are damages at large, and the court F must deal with them and give such damages as, according to general principles, it thinks right.

Mr. Winterbotham has agreed that, if I think the plaintiff is entitled to damages, the damages shall be those specified in para. 12 (1), (2) and (3) of the statement of claim, and he does not dispute that, in the G circumstances of the present case, as I have held that the party in default is the vendor, the purchaser is entitled to the return of the deposit, the deposit being an earnest of the performance of the contract to which the party who has not broken the contract is entitled. The result is that I propose to make a declaration that the plaintiff is entitled to H the repayment by Messrs. Leggett of the deposit of £92 10s. and to award the plaintiff damages for breach of contract as follows : interest at the rate of 4 per cent. from May 17, 1937, in respect of the loss of the use of the deposit of £92 10s. which was handed to Messrs. Leggett on that date, damages in respect of the costs of approving and executing the contract amounting to the sum of £4 0s 6d., and damages in respect

of the costs of investigating the title and preparing the conveyance and searches amounting to the sum of £12 2s. 7d.

Solicitors: *G. C. Wallington*, agent for *J. C. Buckwell & Wallington*, Brighton (for the plaintiff); *Waterhouse & Co.*, agents for *Coleman & Co.*, Hove (for the defendant).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

Re AN ARBITRATION BETWEEN COMPAGNIE PRIMERA DE NAVAGAZIONA DE PANAMA AND COMPANIA ARRENDATARIA DE MONOPOLIO DE PETROLEOS S.A.

[KING'S BENCH DIVISION (Branson, J.), **March 15, 1939.**]

Shipping—Charterparty—Charterparty to remain in force for two consecutive voyages—Deviation in first voyage—Whether charterers bound to make second voyage.

By a charterparty dated Dec. 30, 1937, the *Yolanda* was chartered to go to Istanbul and from there, as ordered, to proceed to Constantza, or to a safe port in the Black Sea, and there to load oil in bulk and take it to a Mediterranean port between Cartagena and Barcelona, inclusive. The vessel was at liberty to call at any ports in any order, to tow and assist vessels in distress, to deviate for the purpose of saving life, and to call at any port or ports for bunker supplies. The charterparty was to remain in force for two consecutive voyages upon the same terms and conditions. The *Yolanda* loaded oil at Constantza for Valencia. On leaving Constantza, the captain set his course for Zonguldak, which is about 150 miles east of the Bosphorus, and is not a port on the ordinary route from Constantza through the Bosphorus. Later, owing to weather conditions, he altered his course, and went to Istanbul. From Istanbul, he sailed for Algiers, but put into Bona, a North African port, about 30 miles off his course, when he still had sufficient bunkers to reach Algiers. It was contended that these were deviations under the charterparty, and that the charterers were entitled to refuse to implement the contract with regard to the second voyage.

HELD: (i) the proceeding towards Zonguldak was a deviation, but the putting into Bona was not.

(ii) the deviation in the first voyage, did not relieve the charterers of the performance of the charterparty, or of the necessity for giving orders for the second voyage.

[EDITORIAL NOTE.] The point here is the short one whether the deviation during the first voyage entitled the charterers to repudiate the contract in respect of the second voyage, the charterparty providing for two consecutive voyages. This a matter not covered by previous authority, and it is decided that the contract for the second voyage is not avoided and must be performed.

AS TO EFFECT OF DEVIATION, see HALSBURY, Hailsham Edn., Vol. 30, pp. 293-297, paras. 487-489; and FOR CASES, see DIGEST, Vol. 41, pp. 487-490, Nos. 3182-3195.]

Cases referred to:

- (1) *Leduc v. Ward* (1888), 20 Q.B.D. 475; 41 Digest 485, 3172; 57 L.J.Q.B. 379; 58 L.T. 908.
- (2) *Glynn v. Margeson & Co.*, [1893] A.C. 351; 41 Digest 311, 1715; 62 L.J.Q.B. 466; 69 L.T. 1; affg. S.C. sub nom. *Margeson v. Glynn*, [1892] 1 Q.B. 337.
- (3) *Falkering v. Winter Bros.* (1932), 34 Lloyd L.R. 30.

- (4) *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K.B. 148; Digest Supp.; 103 L.J.K.B. 513; 150 L.T. 69.
- (5) *Freeth v. Burr* (1874), L.R. 9 C.P. 208; 12 Digest 340, 2838; 43 L.J.C.P. 91; 29 L.T. 773.
- (6) *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 12 Digest 339, 2835; 53 L.J.Q.B. 497; 51 L.T. 637; *affg.* (1882), 9 Q.B.D. 648.

A

APPEAL by way of special case stated from the decision of the umpire in a commercial arbitration between the Compagnie Primera de Navagazona de Panama, the owners of the Yolanda, and the Compania Arrendataria de Monopolio de Petroleos S.A., who chartered the Yolanda. The facts are fully set out in the judgment.

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A. A. Mocatta for the claimants.

H. U. Willink, K.C., and *John Forster* for the respondents.

C

BRANSON, J. : By a charterparty dated Dec. 30, 1937, the Yolanda was chartered to go to Istanbul and from there, as ordered, to proceed to Constantza, or to a safe port in the Russian Black Sea, and there to load some oil in bulk and take it to one port in the Spanish Mediterranean between Cartagena and Barcelona, inclusive. The charterparty contained certain liberties to deviate. One of them is contained in cl. 9 :

D

The vessel has liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property.

Clause 12 says :

E

The vessel to have leave to tow or be towed, and to assist vessels in all positions of distress, or to call at any port or ports for bunker supplies.

The charterparty was to remain in force for two consecutive voyages at the same rate of freight and upon the same terms and conditions as were provided in the charterparty. The Yolanda went to Constantza in

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accordance with the charterparty, loaded a cargo of oil, and on Jan. 22, 1938, sailed for Valencia. At the time of sailing, the vessel had on board 58 tons of bunker coal, her total bunker capacity being 876 tons of coal.

Her normal consumption of bunkers was 35 tons per day for a normal distance of about 150 miles. The captain, when he left Constantza,

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intended to call at Zonguldak for bunkers, and set his course for that port. Zonguldak is about 125 miles eastwards of the Bosphorus, and is not a port on the ordinary route from Constantza through the Bosphorus. At some point between Constantza and Zonguldak, the exact position of which was not proved, the captain on Jan. 23 altered

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his course to proceed to Istanbul because he considered that, owing to the weather conditions, bunkering at Zonguldak would not be safe. The ship arrived at Istanbul on Jan. 24 at 1 p.m.; her bunkering space being then entirely empty, and at that port she took on board 308 tons of bunker coal. She then sailed for Algiers where she had been ordered to take on board a non-intervention officer before proceeding to Valencia

to discharge. She proceeded by the ordinary route towards Algiers, and between Jan. 25 and Jan. 31 she met with weather which was no worse than might have been reasonably expected for the time of the year. On Feb. 1, the Yolanda was off Bona, a North African port some 240 miles east of Algiers, and at that time she had on board about 75 to 80 tons of bunkers, which would have been sufficient to enable her to reach A
Algiers. She nevertheless called at Bona and took on board 220 tons of bunkers there. She left that port and was, on Feb. 2, 1938, captured by warships flying the Spanish Nationalist flag and was ordered to proceed to Palma, where she arrived on Feb. 3, and where she subsequently discharged her cargo. On Feb. 15 the respondents' agents were informed B
that the Yolanda was lying at Palma and on Feb. 28 they were informed that the vessel had on the previous day left Palma and would be arriving at Algiers the same afternoon. At the same time the claimants' agents requested the respondents to give orders for the steamer's next loading port, it being indicated that the Yolanda had been forced to discharge C
her cargo at Palma. On Mar. 1 the respondents' agents were informed that the Yolanda was proceeding from Algiers to Istanbul for orders in accordance with the charterparty. They were also asked whether the irrevocable credit for freight, which cl. 32 of the charterparty provided for, had been established in accordance with that clause. On Mar. 3 the D
respondents' agents replied that cl. 32 of the charterparty required credit to be established before the vessel sailed from the last discharging port on the first voyage under the charterparty. In the language used by the umpire, "they also referred to deviations during the first voyage and reserved their rights in respect thereof." After some further E
correspondence regarding orders for the second voyage, the respondents took the view that as the vessel had not completed her first voyage the question of opening a credit did not arise, and as to the giving of orders these were not required until the vessel reached Istanbul. On Mar. 12 the claimants' agents stated that the vessel was nearing Istanbul and F
asked again for orders, and on Mar. 14 the respondents' agents definitely declined to give any orders for the second voyage. Thereupon the claimants chartered the vessel elsewhere and indicated that they would in due course claim damages.

On those statements of fact, the umpire found as a fact that, when G
proceeding towards Zonguldak, the Yolanda departed from her direct course in accordance with the charterparty, and it is not disputed now that the action of the master in directing the course of the ship towards Zonguldak instead of towards Istanbul amounted to a deviation under the charterparty. The umpire also found that at the time when the H
Yolanda altered her course for Bona, she had a sufficient quantity of bunkers on board to enable her to reach Algiers, and he accordingly finds further as a fact that in proceeding to Bona the Yolanda had again departed without necessity from her direct course under the charterparty.

The first question which arises for decision before me is whether the

act of the Yolanda in altering course for Bona when she had a sufficient quantity of bunkers on board to enable her to reach Algiers constituted an unpermitted deviation from her course. That depends upon whether the liberty given by the clauses in the charterparty, which I have already referred to, were sufficient to justify her in committing what would
 A otherwise have been a deviation. Now it is said on the part of the ship that the liberties are sufficient to justify that deviation. Whether or not they are, I think, depends upon the true construction to be placed upon such a clause as this when it is found in a charterparty. I think that light upon that subject is to be found by going back to the old cases
 B of *Leduc v. Ward* (1) and of *Glynn v. Margetson & Co.* (2). I do not think it is necessary to go into either of them in any detail, but it seems to me to be sufficient to refer to a passage or two in the judgments of those cases. First, in *Leduc v. Ward* (1), LORD ESHER, M.R., dealing with a clause which was in some respects wider than that in the present case,
 C for there the liberty was given to call at any ports in any order, said, at p. 482 :

Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named
 D voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that.

That language was used in order to cut down the *prima facie* meaning of the wide language used ; and similarly here if one looks simply to the
 E language used, it is amply wide enough to cover a liberty to put into the port of Bona. The only question is whether, applying the ordinary canons of construction which the courts have applied to such cases as the present, that wide liberty is cut down sufficiently to make it a deviation for the ship to put into Bona in the circumstances. I proceed then
 F to apply the language which LORD ESHER, M.R., used to cut down the generality of the very wide words that appeared in the case before him in order to see whether Bona is excluded in the present case. It appears from the chart that Bona is a port between the terminus *a quo* and the terminus *ad quem* of the voyage. It is a port which is only a few miles,
 G some 30 miles or so, according to a rough glance at the chart, out of the direct route between Istanbul and Algiers, which was one of the ports to which this ship had to go. I think that it would be giving no force at all to the clause if I were to conclude that a call at that port for the purpose of bunkering was not within the liberty reserved under the
 H charterparty to the ship. *Glynn v. Margetson & Co.* (2) really carries the matter no further, and I do not think it is necessary to cite any of the passages from the judgment in that case which have been referred to in argument before me. So the position with regard to deviation is that the deviation to Zonguldak is an unauthorised deviation, but the deviation to Bona was within the liberties of the charterparty. The next question

which then arises is whether the deviation to Zonguldak has or has not been waived by the charterers. Waiver is a question of mixed law and fact and I think, following the course taken by WRIGHT, J., in *Valkering v. Winter Bros.* (3), that, if it were necessary to do so, it would be proper to request the umpire to assist the court by finding as a fact whether there had been a waiver or not. It is contended on the one hand that upon the true construction of the language used in the special case the umpire has found that there was no waiver, because he has found that the knowledge in the charterers which they must have had before they could be held to have waived a breach of the contract was not in their possession until a late stage in the arbitration proceedings. It is contended on the other hand that the proper construction of the special case does not lead to any such result. In my view the clause in the special case which is material upon this point is ambiguous. It reads as follows :

The respondents were not aware of the course which had been taken by the vessel in the Black Sea until a much later stage in the proceedings. The respondents were, however, aware on or about Feb. 3, 1938, that the vessel had called at Bona.

Now, as a matter of construction, if one had to give a concluded opinion about it, it would appear to me that the meaning of that clause is that the respondents were not aware of the course which the vessel had taken in the Black Sea until some time after the course had been taken because of the expression "until a much later stage in the proceedings." No other stage in the proceedings, if "the proceedings" mean arbitration, had been referred to at all by the umpire and I think it must have meant that they did not know until some time after the event had happened. Now that is not sufficient to enable this court to come to an opinion as to whether or not there had been a waiver and, if waiver were material, I should have felt obliged to remit the case to the arbitrator for a finding of the necessary facts, to wit, the fact as to the date when the knowledge that the ship had shaped her course for Zonguldak had come to the charterers. But in my opinion the decision to which I have arrived upon the last point which is raised in the case renders it unnecessary for me to trouble the umpire to go into this matter again.

The last point is this. It was contended on the part of the ship that this charterparty, relating as it does to two voyages, enables the two voyages to be treated as severable matters and governed by several contracts, though each contract would, of course, be in the same terms as the other. It is contended, on the other hand, by the charterers that the contract is one and indivisible, and that by virtue of the fact that there was this deviation to Zonguldak the whole contract has come to an end, or did come to an end, as soon as the charterers, having discovered the deviation, chose to assert their rights and declare themselves no longer bound by that contract. It was pointed out by Mr. Willink that, first of all, in the charterparty the expression "this charter" is used, and, secondly, that there is only one cancelling date, and, thirdly, that there is no date for the starting of the second voyage, and those

- things are relied upon as showing that this is an indivisible contract. But I cannot help thinking myself that when one is discussing the question, such as arises in the present case, of the determination of a contract for two voyages by reason of the deviation in the first of them, it is necessary to consider the reason why a deviation from the contracted voyage is considered such a heinous offence in relation to a contract of carriage by sea. These matters have been talked about both in *Leduc v. Ward* (1) and in *Glynn v. Margetson & Co.* (2), and it is unnecessary for me to enumerate them in any detail, but the chief of them is that if the ship deviates from the voyage which is prescribed for her, she is embarking upon an adventure to which the contract does not apply at all. Secondly, if she deviates from the voyage laid down for her, she may be invalidating all the insurances which the charterers may have effected upon her cargo. None of those considerations would apply to a case like the present case which, so far as I am aware, is bare of authority and has to be decided upon first principles. I think one of the principles that one should apply to a case like this is that of *cessante ratione legis, cessat ipsa lex*. The reason why so much weight is put, and has been put, by merchants and by the courts upon deviations in contracts of carriage by sea does not apply where one has in one document contracts which cover more than one voyage. One could not tell from this contract what would be the second voyage at all. It is not the same voyage. When the ship arrived at Istanbul the second time she might have had instructions to go, not to Constantza, but to some other port in the Black Sea, which would render the contract voyage a different voyage altogether. I think, therefore, that the true analogy to apply to a case of this kind is not the analogy of a charter for a single voyage, but the analogy which I was invited by counsel for the claimants to apply—namely, the analogy of a contract for the delivery of goods by instalments. The recent case of *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd.* (4), lays down the principles which are applicable in a case of that kind. It appears from the judgment in that case that what one has to look at is the circumstances of the particular case. It is said, as was said in *Freeth v. Burr* (5), that you must examine the circumstances
- “in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.”
- That was cited by LORD HEWART, L.C.J., at p. 155 from the language used by LORD SELBORNE, L.C., in *Mersey Steel & Iron Co. v. Naylor, Benson & Co.* (6), the whole matter is summed up by LORD HEWART, L.C.J., at p. 157 in this way :

With the help of these authorities we deduce that the main tests to be considered in applying the sub-section [the sub-section of the Sale of Goods Act which was based upon these old authorities] to the present case are, first, the ratio quantitatively

which the breach bears to the contract as a whole; and secondly the degree of probability or improbability that such a breach will be repeated.

It is said that the breach here quantitatively considered is a breach of 50 per cent. of the contract. In a sense it is, because taken by itself—if it is not waived—the deviation to Zonguldak would have been enough to put an end to a charter for a single voyage, but that particular expression does not, to my mind, apply to a case of this sort at all. What you have got to see is whether there is anything in what the ship has done to make it appear that the ship did not intend to continue to fulfil its obligations under this charterparty. In my view, the answer to that is that there was nothing; there was nothing to indicate that the ship intended to deviate in the second voyage, and there was nothing in the circumstances to render it in the least probable that the ship would deviate in the second voyage, and, therefore, applying the test which was laid down in the *Maple Flock Co.* case (4), I come to the conclusion that what had taken place in this case was not sufficient to entitle the charterers to refuse to implement the contract with regard to the second voyage.

The result is that the deviation to Zonguldak was a deviation in law; but that that did not relieve the charterers from the performance of the charterparty, or the necessity for giving orders for a second voyage.

Solicitors: *Holman, Fenwick & Willan* (for the claimants); *Middleton, Lewis & Clarke* (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

GUARDIAN ASSURANCE CO., LTD. v. SUTHERLAND.

[KING'S BENCH DIVISION (Branson, J.), **March 13, 15, 1939.**]

Insurance—Motor insurance—Third-party risks—Material misrepresentation and non-disclosure—Policy voidable—Declaration under Road Traffic Act, 1934 (c. 50), s. 10 (3)—Meaning of “policy of insurance” within Road Traffic Act, 1930 (c. 43), s. 36 (4)—Nature of indemnity under Road Traffic Act, 1930 (c. 43), s. 36 (4)—Right to declaration in absence of defendant.

A policy of insurance and a cover note against third-party risks in respect of a motor-car were obtained by misrepresentation and non-disclosure of material facts:—

HELD: (i) the insurance company was entitled to a declaration under sect. 10 (3) of the Road Traffic Act, 1930, that they were entitled to avoid the policy and the cover note.

(ii) a policy of insurance or cover note so obtained insures no one, and therefore cannot be held to be a “policy of insurance” within sect. 36 (4) of the Road Traffic Act, 1930, so as to make the insurance company liable under that section to indemnify the persons or classes of persons specified in the policy.

(iii) the Road Traffic Act, 1930, s. 36 (4) only gives a statutory right to specified persons to sue upon the contract of insurance, and does not place a statutory liability upon the insurer.

(iv) where an insurance company are suing for a declaration under the Road Traffic Act, 1934, s. 10, it is a proper case for the court to make a declaratory order in the absence of the defendant.

[EDITORIAL NOTE. There were probably many ways in which the legislature might have safeguarded the rights of third parties entitled to damages and costs as a result of an action for personal injuries arising from a motor car accident. It was suggested here that there was a statutory right to recover those damages and costs in any event, but the court has held that the statutory right is a right to sue upon the contract, and therefore the insurance company can rely upon any defence which is open to them as against the insured.

AS TO DECLARATION THAT POLICY AVOIDED, see HALSBURY, Hailsham Edn., Vol. 18, pp. 564, 565, para. 914; and FOR CASES, see DIGEST, Supp., Insurance, Nos. 3217gg-3217kk.]

Cases referred to :

- B**
- (1) *McCormick v. National Motor & Accident Insurance Union, Ltd.* (1934), 50 T.L.R. 528; Digest Supp.; 40 Com. Cas. 76.
 - (2) *Vandepitte v. Preferred Accident Insurance Corp. of New York*, [1933] A.C. 70; Digest Supp.; 102 L.J.P.C. 21; 148 L.T. 169.
 - (3) *New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.*, [1939] A.C. 1; [1938] 4 All E.R. 747; Digest Supp.; 108 L.J.K.B. 115; 160 L.T. 137.

C ACTION for a declaration under the Road Traffic Act, 1934, s. 10 (3) that the plaintiffs were entitled to avoid a policy of insurance dated Mar. 17, 1938, and/or a cover note dated June 17, 1938, issued by the plaintiff to the defendant Sutherland, on the ground that they were obtained by representations of fact false in some material particulars and/or by non-disclosure of material facts, and for a further declaration that the plaintiffs were under no liability to indemnify the defendants or either of them in respect of any damages or costs which might be awarded against the defendants or either of them in actions brought against them by one Henry Dimmock and his wife for personal injuries alleged to have arisen out of an accident occurring on June 20, 1938, in which a car driven by the defendant Sidebotham was involved.

E The Road Traffic Act, 1930, s. 36 (4), provides as follows :

F Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

A. T. Miller, K.C., and *Montague Berryman* for the plaintiffs.

Valentine Holmes for the defendant Sidebotham.

The defendant Sutherland did not appear.

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BRANSON, J. : In this case, the defendant Sutherland has allowed this action to go against him by default, and the plaintiffs are moving for judgment in default. The defendant Sidebotham is defending the action, and counterclaims a declaration that the plaintiffs are bound to indemnify him against the claims of Mr. and Mrs. Dimmock, or one Alison Griffiths, who was a passenger in the car he was driving when he collided with the Dimmocks.

H The facts are as follow : On Mar. 17, 1938, Sutherland signed a proposal form for a policy to cover a Mercedes Benz car BXD 1, and the plaintiffs issued a cover note upon that proposal. Fresh cover notes were issued

from time to time until May 26, when the policy was issued. Sutherland's proposal contained a number of misrepresentations, and it is not suggested that the plaintiffs are not entitled to avoid the policy issued upon the basis of it. On May 30, Sutherland telegraphed to the plaintiffs :

Cancel insurance of Mercedes Benz to Lancia.

This was confirmed on June 10, when Sutherland signed a form asking that the Lancia should be substituted for the Mercedes BXD 1 in policy No. 761,918. The plaintiffs agreed, and the policy was indorsed accordingly.

On June 17, 1938, a telegram was sent by an employee of Green Park Motors, Ltd., at the request of the defendant Sidebotham, to the plaintiffs :

Please cover me on Mercedes EYT 114 as well as Lancia.

The telegram was signed : "Sutherland." The telegram was followed on June 20 by a form signed by the defendant Sutherland, asking that EYT 114 should be substituted in policy No. 761,918 for the Lancia, and containing the statement that Sutherland was the owner of EYT 114, and that it was registered in his name. On receipt of the telegram of June 17, the plaintiffs issued to Sutherland the cover note M.99,458 purporting to hold Sutherland covered on the terms of the plaintiffs' usual form of Class 1 comprehensive private motor car policy in respect of EYT 114 for 15 days from 4.15 p.m. on June 17. On June 20, at 11.25 p.m., after the cover note of June 17 had been issued, and before the form signed by Sutherland on June 20 had reached the company, Sidebotham, who was driving EYT 114 collided with the Dimmocks, who were in a motor cycle sidecar combination, causing them personal injury. On July 6, Dimmock and his wife issued a writ against Sutherland, who left the country. The Dimmocks have not proceeded with that action, but on Sept. 15, 1938, they issued a writ against Sidebotham.

The true state of affairs which led to the telegram of June 17, being sent was as follows : The car EYT 114 was the property of Green Park Motors, but, when Sidebotham introduced one Chang, a Chinese, to them as a purchaser, Chang agreed on June 17 to buy, on terms that certain alterations should be made to the car. Chang, owing to his foreign nationality, could not get cover without delay. Sidebotham had had a policy applicable from Aug. 15, 1937, to Aug. 15, 1938, but, as he had a number of convictions for dangerous driving and driving without care, not revealed in his proposal form, had also failed to reveal some of his previous accidents, and had misstated his age as being over 21, when in fact it was 19½, his policy had in fact been avoided in Oct., 1938. It was therefore arranged that EYT 114 should be represented as being the property of Sutherland, who had no interest in it at all, and should be insured under his policy.

In these circumstances, the plaintiffs contend that, the policy having been obtained by misstatement and concealment, it may be avoided.

by them, and brings them under no liability to indemnify Sutherland or Sidebotham. The case for Sidebotham is, first, that, although the contract of insurance relating to BXD 1 was obtained by misrepresentation, when the Lancia was substituted for BXD 1, a new contract arose, which was not invalidated by any misrepresentation. This contention is disposed of by the language of the form dated June 10, 1938. The parties might have made a new contract, had they chosen. The form shows that they kept the old contract alive, substituting one car for another under it. The same applies when EYT 114 was substituted for the Lancia. The existing contract was altered, but was still to be kept alive. If this were not so, it is plain, in my opinion, that the cover note issued in respect of EYT 114 was a new contract and was plainly obtained by material misrepresentation. The telegram of June 17, purporting to come from one who was already insured in respect of the Lancia, which he had declared to be his own property, clearly represents that EYT 114 is Sutherland's property, and that Sutherland is asking for cover against his liabilities in respect thereof. It could not be successfully suggested that it was not material for insurers to know that Sutherland had nothing to do with the car, but that it was sold to Chang and about to be driven by Sidebotham, with his bad record of offences and accidents. I see no ground, therefore, for suggesting that, apart from the second line of defence raised by the ingenuity of Mr. Holmes, the plaintiffs are not entitled to the declarations which they seek.

This contention rests upon the Road Traffic Act, 1930, s. 36 (4). This subsection, it is argued, confers upon any person or class of person specified in a policy of insurance issued under that section a statutory right to indemnity in respect of any liability which the policy purports to cover. A policy, it is said, is none the less a "policy issued under the section" because it has been obtained by misrepresentation or fraud, and the statutory right to indemnity arising, by force of the statute, on the issue of the policy, and not of the contract contained in the policy, remains in force, though the contract may be voidable—or, indeed, avoided or rescinded—by mutual consent of the parties.

Apart from authority, I cannot so construe the subsection. It applies to "a person issuing a policy of insurance under this section"—that is to say, by virtue of subsect. (1) (b), one which :

insures such person . . . or . . . persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road. . . .

A policy obtained by misrepresentation of material facts insures no one, and so cannot be held to be such a policy, and, therefore, subsect. (4) does not apply to a policy so obtained. To accede to Mr. Holmes' argument would be to hold that the legislature had deprived an insurance company which issues a policy under sect. 36 of its common law right to repudiate liability arising out of a policy, the granting of which has

been induced by material misrepresentation. However, I am not left without authority. In *McCormick v. National Motor & Accident Insurance Union, Ltd.* (1), the Court of Appeal had to consider this very subsection. The court came to the conclusion (i) that the opening words of the subsection were inserted to get rid of the difficulty created by the Life Insurance Act, 1774, s. 2, and (ii) that the function of the subsection was to get over the difficulty that nobody who was not a party to a contract could sue upon it: *Vandepitte v. Preferred Accident Insurance Corp'n. of New York* (2). In *McCormick's* case (1), SCRUTTON, L.J., said, at pp. 84, 85 :

I might approach that matter as I approached it in another case. It was a commonplace of the law that an insurance company was not liable on a policy obtained by fraud or by concealment or by innocent misrepresentation. That common law right you would not expect to be taken away, and on the construction the court has adopted it would not be taken away by Parliament without clear words showing to what the Act referred. There is a series of decisions under the Agricultural Holdings Act to that effect; and if I approach subsect. (4), meeting an argument that subsect. (4) intended to take away from insurance companies the right to object to a liability on a policy obtained by fraud or misrepresentation or concealment, I should expect very clear words to compel me to do it; and I find no such clear words in subsect. (4).

Then he goes on to say that the subsection was intended to have the effect, and to make it clear, that a certain defence could no longer be raised. The effect of this paragraph can only be avoided by Mr. Holmes if he says that his action for indemnity is not upon the contract but upon the statutory right conferred by the section. The section does not, in my opinion, impose any statutory liability upon the insurer. It only gives to "persons specified" a statutory right, which, apart from statute they did not possess, to sue upon the contract. This is on all fours with the right given by the Third Parties (Rights Against Insurers) Act, 1930, to third parties in the event of bankruptcy or winding up of persons insured, and the rights given by the Road Traffic Act, 1934, s. 10, to persons who have recovered judgment against persons insured. I am satisfied that subsect. (4) does not help the defendants.

There is yet another reason which, in my opinion, prevents the defendant Sidebotham from getting any protection under the cover note or policy here in question, even if either of them were otherwise a valid contract of insurance. To bring himself within the policy or cover note, he must show that he was driving EYT 114 on the insured's order or with his permission. It was proved that Sutherland had no interest whatever in EYT 114. He had no right to give or to refuse permission to drive it. Sidebotham said :

As he was insuring the car I had to get his permission to get within the policy.

That was a clear confession that the permission he received was only colourable. The provision shows that it was never intended by the plaintiffs that the policy should apply to a car of which the policy holder was not the owner, or was not entitled to the possession and use. For these reasons, the plaintiffs are entitled to the declarations they claim

against both defendants. I give judgment for them, accordingly, on the claim and counterclaim, with costs.

Holmes : In *New Brunswick Ry. Co. v. British & French Trust Corpn., Ltd.* (3), in the House of Lords, their Lordships said that it was not right, except in very exceptional circumstances, that an order for a declaration should be made against an absent defendant. Your Lordship is doing that in this case, but I imagine your Lordship would say that it was an exceptional case, because the Act of 1934 enables an insurance company to come to the court and ask for a declaration.

BRANSON, J. : Yes. I think that must be so. It is the only relief that is possible.

Judgment for the plaintiffs, with costs.

Solicitors : *Berryman's* (for the plaintiffs) ; *Pritchard, Englefield & Co.* (for the defendant Sidebotham).

C [Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

E. E. & BRIAN SMITH (1928), LTD. v. WHEATSHEAF MILLS, LTD.

D [KING'S BENCH DIVISION (BRANSON, J.), **March 27, 28, 1939.**]

Arbitration—Application of rules of law—Exclusion by contract—Custom—Damages to be assessed once and for all—Mercantile reference.

E Upon the arrival of a cargo in London, the sellers tendered documents to the buyers which the latter refused to accept. The contract was subject to the rules of the London Corn Trade Association. Upon an arbitration it was found that the buyers had a right to reject the cargo. The buyers then put forward a further claim for the difference between the contract price of the cargo and the market price at the date when it should have been delivered. It was contended that this claim should have been put forward in the previous arbitration. The award upon the second arbitration stated in the form of a special case contained a finding that there was a custom in respect of contracts of the London Corn Trade Association that a claim to reject goods should be limited to rejection and there was a right to put forward a subsequent claim for damages after the question of rejection had been determined :—

F **HELD :** (i) the rule that all relief to which a party is entitled under one cause of action shall be claimed in one proceeding did not apply to these arbitrations, since the rule was excluded by the custom, which was a reasonable one and not illegal, and therefore binding.

G (ii) the buyers had no cause of action in damages until there was a breach of contract, and the first tender of documents was not necessarily a breach of contract, since it might have been followed by a subsequent tender to which no proper objection could have been taken.

H [EDITORIAL NOTE. The question here is whether the rule that all damages must be recovered once and for all applies to arbitrations as it most certainly does to proceedings in a court of law. It is shown that the rule may be excluded by express provision of the contract or by the custom of the particular trade in which the question arises.

AS TO MERCANTILE REFERENCES, see HALSBURY, Hailsham Edn., Vol. 1, p. 653, para. 1104 ; and FOR CASES, see DIGEST, Vol. 2, pp. 473-475, Nos. 1178-1188.]

Cases referred to :

- (1) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 21 Digest 207, 480; 53 L.J.Q.B. 476; 51 L.T. 529.
- (2) *Kitchen v. Campbell* (1772), 3 Wils. 304; 21 Digest 208, 489; *sub nom. Hitchin v. Campbell*, 2 Wm. Bl. 826.
- (3) *Conquer v. Boot*, [1928] 2 K.B. 336; Digest Supp.; 97 L.J.K.B. 452; 139 L.T. 18. A
- (4) *Henderson v. Henderson* (1843), 3 Hare, 100; 21 Digest 174, 276; 1 L.T.O.S. 410.
- (5) *Naamlooze Vennootschap Handels-en-Transport Maatschappij "Vulkaan" v. A/S J. Ludwig Mowinckels Rederi*, [1938] 2 All E.R. 152; Digest Supp.
- (6) *Ram Dutt Ramkissendass v. Sassoon (E. D.) & Co.* (1929), 56 L.R. Ind. App. 128; Digest Supp.; 98 L.J.P.C. 58; 140 L.T. 542. B
- (7) *Ravee v. Farmer* (1791), 4 Term Rep. 146; 2 Digest 538, 1730.
- (8) *Borrowman v. Free* (1878), 4 Q.B.D. 500; 39 Digest 588, 1893; 48 L.J.Q.B. 65; 40 L.T. 25.

SPECIAL CASE STATED by an arbitrator upon a reference under the rules of the London Corn Trade Association. The facts are fully set out in the judgment. C

Cyril Miller for the appellants.

A. A. Mocatta for the respondents.

BRANSON, J. : This case arises in the following way upon an award stated in the form of a special case by the appeal committee of the London Corn Trade Association. By a contract dated June 10, 1938, the buyers, who are the respondents in this arbitration, bought from the sellers, who are the appellants, Messrs. E. E. and Brian Smith (1928), Ltd., a parcel of China white peas to be shipped from Shanghai for delivery in London. D

The contract contained an arbitration clause. The peas were shipped on the Hakozaiki Maru, and on Aug. 17, 1938, the sellers sent to the buyers a provisional invoice disclosing that the peas in question had been shipped on the Hakozaiki Maru c.i.f. London under a bill of lading made at Shanghai on July 13, 1938. When the ship arrived in London, E

the sellers tendered documents to the buyers, and the buyers in the first place refused to accept the documents. The sellers therefore claimed arbitration upon that point. Arbitrators were appointed, but, when those two appointed arbitrators met, the buyers' arbitrator indicated to the buyers that in his view it was their duty, before raising any question as to their right to reject the shipment, to take up and pay for the documents, and they did so. Upon the same day, they claimed an arbitration upon the question as to whether or not they had a right to reject this shipment. That arbitration was held upon Sept. 5, and the arbitrators awarded that the buyers were entitled to reject the shipment, and that the sellers F

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... shall take back the peas and shall refund to buyers against delivery order the amount of the provisional invoice, together with all charges incurred, and interest on the amount due at the rate of 5 per cent. per annum.

They distributed the costs of the arbitration as follows—namely, £3 10s. 9d. to be paid by the buyers, and £4 3s. 3d. to be paid by the sellers.

The buyers sent their invoice to the sellers, and the sellers paid that amount, £818 3s. 3d. Thereupon the buyers put forward a further claim, asking to be paid the difference between the contract price of the peas and the market price at the date when they should have been delivered, an amount alleged to be £187 10s. That was based upon non-delivery of
A the contract goods in pursuance of the contract, and a further arbitration was held in respect of that dispute, the sellers taking the point that the award which had been given on Sept. 5 was final and binding between the parties, and that the buyers could not put forward any further claim in respect of this contract. On that the arbitrators differed. They appointed
B an umpire, who awarded the buyers damages, and the sellers then appealed to the appeal committee, who upheld the umpire's award. The appeal committee in their special case set out that Mr. Bulow and Mr. Grimsdale, the arbitrators before whom the arbitration with regard to the right to reject had been held, had both given evidence before the committee :

C . . . to the effect that in the original arbitration upon which the award of Sept. 5, was made, no request was submitted to the arbitrators to decide the amount of damages sustained by the buyers if they were entitled to reject the goods.

The committee proceeded to find in paras. 16 and 17 of their special case :

D 16. We find that there is a well-recognised practice, amounting to a custom in the trade, in respect of disputes such as that in question arising under the contracts of the London Corn Trade Association, that where a buyer claims to reject the goods tendered under the contract he is entitled to limit his claim to the question of rejection and is not bound to put forward any claim for damages until the question as to his right to reject the goods has been determined.

E 17. It is also a well-recognised practice or custom in the trade that having obtained an award allowing rejection the buyer is entitled in a further arbitration to claim such damages as he can prove that he has sustained by reason of a breach of contract by the sellers.

The question of law which they submit for the decision of this court is as follows :

F Whether by reason of the first award, and/or by reason of their conduct in the proceedings terminating in the first award, the buyers are barred from recovering the sum claimed by them in the proceedings terminating in the second award.

That is the question which I have to determine.

The way in which the matter is put on behalf of the appellants is this.
G It is said that the rule under which it is held in courts of law that a litigant must put forward all the relief to which he is entitled under a single cause of action in one proceeding, and is not entitled to litigate on one cause of action and recover part of his relief, and then re-litigate upon the same cause of action to recover further relief, is a principle which
H is well-established in our courts. The matter was exhaustively dealt with in *Brunsdon v. Humphrey* (1). In that case, a collision between two vehicles had injured the vehicle and had injured the plaintiff, and the plaintiff, who was the owner of the vehicle, brought an action in the county court to recover damages in respect of the damage the vehicle had sustained. Having recovered some damages there, he subsequently

brought an action in the High Court claiming damages in respect of the personal injuries which he had himself sustained. An attempt was made to apply to that case the two maxims *nemo debet bis vexari pro una et eadem causa* and *interest reipublicae ut sit finis litium*, and, having considered the application of those maxims, the court came to the conclusion that, as there were two causes of action, albeit they arose out of the same set of facts, the plaintiff was not debarred by having brought his county court action for damages to the vehicle from suing again for damage received in the same accident by himself personally. SIR WILLIAM BRETT, M.R., puts the matter in the following way, at p. 146 :

Two actions may be brought in respect of the same facts, where those facts give rise to two distinct causes of action.

In the same case, BOWEN, L.J., dealt with the matter in the following language, at p. 147 :

It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit.

Then he quotes DE GREY, C.J., in *Kitchen v. Campbell* (2), at p. 831 :

The principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments in a plea ; or by proper facts stated in a special verdict, or a special case.

Then, after citing a number of cases, BOWEN, L.J., says, at p. 148 :

It is evident therefore that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance.

Both counsel for the appellant and counsel for the respondent have referred to that case, and it is not disputed that that case lays down the principle upon which the courts have acted in applying that rule to cases which have come before them. It is unnecessary for me, therefore, to refer in detail to *Conquer v. Boot* (3) or *Henderson v. Henderson* (4). They are both interesting cases, but they do not seem to me to carry the matter any further.

It is plain that in the ordinary tribunals of the country the rule applies, but the next question is whether or not that rule applies in arbitrations, for this is an arbitration with which I am dealing. I think that the question of whether or not it applies to arbitrations must be decided with reference to the words of LORD MAUGHAM in the *Vulcan* case (5), at p. 156. I do not propose to read again his Lordship's quotation from the judgment of LORD SALVESEN in *Ram Dutt Ramkissendass v. Sassoon* (*E. D.*) & *Co.* (6). The substance of it is that in mercantile references of the kind in question the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a court of law can be equally propounded for the arbitrator's decision, unless the parties have agreed to exclude that defence. For

the purpose of deciding this point, I will assume that the argument of Mr. Miller is correct when he says that there is in this matter only one cause of action, and that, therefore, the parties, when the case came before the arbitrators for them to decide whether or not the tender of the parcel of peas could be rejected, should have raised any other question arising from the breach of contract which he argues was constituted by the tender of the bill of lading for these particular peas, and, if the rule was to apply, the buyers ought to have claimed damages for non-delivery of peas then, and cannot in a subsequent arbitration ask for any such damages. The question would then arise whether or not in this particular instance there was any agreement to exclude the application of the ordinary rule. That is the first point upon which Mr. Miller relied. In my view, the true position in that regard is that one has to look at this particular contract to see whether or not there is in the contract between these parties any agreement that this particular rule should not apply to arbitrations between them. For that purpose, I think that it is right to look, first of all, at the terms of the contract, and I think that, secondly, one must have in mind the findings of the arbitrators, and the appeal committee, with regard to the question of custom. When people are making a contract in a particular market, they are held to be bound by any customs of that market which are reasonable and certain, and which are not unlawful. It is plain upon the custom found that the parties, agreeing to go to arbitration under a contract of the London Corn Trade Association, must be taken to have agreed to carry out the arbitration according to the customs of that association, with the limitation, of course, that they would not be bound by any such custom if it were unreasonable or unlawful, and in that sense contrary to the general law. It is said here, on behalf of the buyers, that this contract, read in the light of that custom, clearly provides that any disputes which may arise shall be settled *seriatim*, without its being necessary to submit to one arbitration all the disputes which in any particular instance the parties should have envisaged, so that all can be cleared off in one arbitration. It is plain, of course, from the language of the document itself, that successive arbitrations are contemplated under the agreement for arbitratio :

G All disputes from time to time arising out of this contract shall be referred to arbitration.

That is the method which, according to the custom, is adopted in practice amongst the people dealing under the association in question. If it could be said that the custom was contrary to law, of course it could not be held to bind anybody, even the parties to the agreement, if they expressly referred to it. The question as to whether or not it is contrary to law in the sense in which that quality would prevent it from taking effect is another matter altogether. In my view, the custom which is alleged—and which is obviously convenient, or it would not have been adopted by an association of business men in a case of this kind—

namely, to decide first of all the question as to whether or not a particular parcel of goods is such that it can be rejected, before going into any question of damages which might arise upon the hypothesis that it can be rejected, and that it cannot be replaced by some other parcel of goods, is a very convenient one, and it seems to me that to apply the doctrine of *res judicata*, as it has been applied in some of the cases, to conditions such as those pertaining in these trade arbitrations would be a very serious matter indeed. There is authority on this point in *Ravee v. Farmer* (7). In that case, it was held that :

An award made upon a reference of *all matters in difference* between the parties, does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred. There one has, first of all, the fact that there was a general reference of all matters in difference between the parties, and then, in spite of that, upon it appearing that the matter was not in difference between him and the plaintiff at the time of the submission, nor referred to the arbitrators, the plaintiff could bring another action. I do not know that one could safely say that the authority in that case was conclusive on this matter, but at all events it goes a long way towards the conclusion that, when one considers all the differences between these rapid trade arbitrations and an action instituted in a court of law, in the one case there are no formalities in the way of pleading, and it is uncertain what are the particular matters in litigation which are submitted by the parties to the decision of the arbitrator, and in the other case one has everything set out, so that it is quite easy to come to a conclusion upon the matter. Upon this point, I think that the buyers are right, and, by reason of the provisions of the agreement, made, as it was, in view of the custom that the arbitration could take place in stages, and that it was not necessary to have every possible claim before the arbitrators in the first instance, I think that the appeal committee came to a correct conclusion in upholding the award.

However, I think that there is another, and, to my mind a much more simple and direct, method of arriving at the same conclusion, and that is this. In a contract of this kind, where the seller has to tender a provisional invoice, which the buyer may reject if he is correct in thinking that the provisional invoice does not represent the contract goods, when a provisional invoice is tendered, and the buyer is disposed to reject it, even if it be decided in his favour that he was entitled to reject it, it does not prevent the seller, if he has time within which to do so, from tendering another parcel of goods, which may be goods which accord with the contract, and which the buyer must, therefore, accept, and for which he must pay. In the present case, according to the views taken by the first two arbitrators who were appointed to decide, but did not decide, whether the buyer had got to take up the documents, and pay for them before they could raise the question of their right to reject, it was plain to everybody that, if that process was gone through, it was going through

the mere formality, and that the right to reject was being kept open if it existed, and there was to be an arbitration to decide whether or not there was such a right. When it was decided that there was such a right, all that the award did in fact was to put matters back in the position in which they were when the documents were tendered, and when the

- A buyers were saying that they were under no obligation to accept them. In my view, the position of the parties in such a contract is that, when the seller tenders documents which he says are a fulfilment of the contract, but which the buyer declines to accept as a fulfilment of the contract, the seller does not become in breach. All that the buyer has said is :
- B "You have not yet fulfilled your contract." That is all he can say, because it cannot be predicated in any particular case that, if the first tender is not a proper tender, there may not yet be another tender which is a proper tender. It cannot be said that the seller becomes in breach the moment he tenders goods which for some reason or other (it may be some
- C purely formal reason with regard to the documents) the buyer can say are not in fulfilment of the contract, and that the seller cannot put himself right by making a subsequent tender. As an instance of a case which decided the contrary, I have been referred to *Borrowman v. Free* (8). In that case, the plaintiffs tendered the cargo of one ship, which the
- D defendants refused to accept, upon the ground that the shipping documents were not tendered with it. The plaintiffs insisted that the tender was valid, and that dispute was referred to an arbitrator, who decided that the tender was invalid. The plaintiffs, within the time limited by the contract, tendered the cargo of another ship, which the defendants
- E refused to accept upon the ground that they were not bound to accept any cargo in substitution for that of the first ship, the tender of which the arbitrator had decided to be invalid. The circumstances were very similar to the circumstances in the present case. COTTON, L.J., said, at p. 506 :

- F I cannot agree that the arbitration was equivalent to a judgment for damages in an action : the question at the arbitration was merely whether the plaintiffs were wrong in tendering that cargo.

Those words seem to me to cover the present case completely. The decision in the arbitration which is said to be binding upon the parties

- G here was not equivalent to a judgment in an action for damages. It was a mere decision of the question as to whether or not the tender of the peas was a fulfilment of the contract, and it was held that it was not. The subsequent result of that being so held, and of there being no tender in substitution for it, was that the sellers did become in breach. When they
- H did become in breach, then the buyers asked them to pay damages for that breach. Until that breach existed, the buyers had no cause of action for damages, and upon this ground also I come to the conclusion that the award of the members of the appeal committee was correct. They ask the following question :

Whether by reason of the first award, and/or by reason of their conduct in the

proceedings terminating in the first award, the buyers are barred from recovering the sum claimed by them in the proceedings terminating in the second award.

The answer is that the buyers are not so barred.

Solicitors: *Godden, Holme & Ward* (for the appellants); *Richards, Butler, Stokes & Woodham Smith* (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

PARDY v. PARDY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), B
February 10, March 27, 1939.]

Divorce—Desertion—Separation deed—Husband's failure to perform covenant to pay—Repudiation of deed—Necessity for bona fide deed and complete repudiation accepted by other party.

The petitioner was married to the respondent on Sept. 29, 1928. They lived at the house of the husband's parents. The marriage was a failure almost from the commencement of their married life, the husband staying out at night and drinking heavily. In 1932, a deed of separation was executed, and from that time they lived apart. The sums accruing due under the deed were paid for the first 12 weeks, but after that only £2 or £3 was paid in all, no payment being made from 1934 onward. In 1933, the respondent wrote two letters to his wife asking forgiveness and promising help, to which no answer was made. The parties met in 1937 in a spirit of neutrality to discuss the future, but without result:—

HELD: the separation deed had been entered into *bona fide* between the parties, and the court could not go behind it. The parties were living apart under a deed of separation, and such separation, begun by consent, could not be changed into desertion by a mere refusal to resume cohabitation, or by breach of the covenants in the deed. In the circumstances desertion for a period of 3 years immediately preceding the presentation of the petition was not proved.

[EDITORIAL NOTE.] In one or two recent cases, separation deeds have been held not to have been entered into *bona fide*, or to have been altogether repudiated by one of the parties. In the present case, the nature of desertion is again fully considered, but more particularly with reference to the effect of the execution of a deed of separation. The leading case of *Fitzgerald v. Fitzgerald* (3), which has often been criticised, must now be considered to have defined desertion in terms which subsequent experience has shown not to be entirely accurate in every case. The present case is mainly concerned, however, with the effect of the execution of a separation deed and a separation by consent thereunder. This state of facts seems entirely inconsistent with desertion, and the subsequent separation can only be changed into desertion by a complete repudiation of the deed by one party, accepted by the other party at a time when he or she is willing to return to cohabitation, and in a position to assert, and in fact asserting, his or her conjugal rights. There is, of course, no distinction between the desertion now required for a divorce and that previously required when adultery had also to be shown before a decree could be granted.

AS TO SEPARATION DEEDS AND DESERTION, see HALSBURY, *Hailsham Edn.*, Vol. 10, p. 657, para. 966; and FOR CASES, see DIGEST, Vol. 27, pp. 317, 318, Nos. 2940-2956.]

Cases referred to:

(1) *Ratcliffe v. Ratcliffe*, [1938] 3 All E.R. 41; Digest Supp.

- (2) *Crabb v. Crabb* (1868), L.R. 1 P. & D. 601 ; 27 Digest 228, 1992 ; 37 L.J. P. & M. 42 ; 18 L.T. 153.
- (3) *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694 ; 27 Digest 307, 2845 ; 38 L.J. P. & M. 14 ; 19 L.T. 575 ; *subsequent proceedings* (1874), L.R. 3 P. & D. 136.
- A (4) *Pape v. Pape* (1887), 20 Q.B.D. 76 ; 27 Digest 317, 2945 ; 57 L.J.M.C. 3 ; 58 L.T. 399.
- (5) *Jordan v. Jordan*, [1939] 2 All E.R. 29 ; Digest Supp.
- (6) *R. v. Leresche*, [1891] 2 Q.B. 418 ; 27 Digest 313, 2910 ; 60 L.J.M.C. 153 ; 65 L.T. 602.
- (7) *Watson v. Watson*, [1938] P. 258 ; [1938] 3 All E.R. 770 ; Digest Supp. ; 107 L.J.P. 160 ; 159 L.T. 523.
- B (8) *Smith v. Smith*, [1915] P. 288 ; 27 Digest 317, 2949 ; 85 L.J.P. 16 ; 113 L.T. 1166.
- (9) *Herod v. Herod*, [1939] P. 11 ; [1938] 3 All E.R. 722 ; Digest Supp. ; 159 L.T. 530.

C UNDEFENDED PETITION by wife for divorce on the ground of desertion for 3 years immediately preceding the presentation of the petition. The petitioner sought the exercise of the discretion of the court in her favour. The parties were married in 1928. In 1932, they entered into a deed of separation. The husband kept up punctually for a period of 12 weeks the payments provided for under that deed, but thereafter he paid

D fragmentary sums only, and at the end of 1934 he finally ceased to contribute to the support of the petitioner.

H. B. D. Grazebrook, K.C., for the petitioner.

E LANGTON, J. : The petitioner in this case, Mrs. Alice Mary Pardy, married her husband, the respondent, on Sept. 29, 1928. The parties went to live at the house of the husband's parents. The petitioner consented to this course on the understanding that the arrangement would be a temporary one until her husband should be able to provide a home of his own. The husband was a chartered accountant, and was

F apparently in a sufficiently good position to be able to look forward to providing a separate establishment at a reasonably early date.

From the outset the marriage was unhappy, and at the end of the first year it had become a failure. Mr. Pardy kept his wife exceedingly short of money, stayed out at night, drank rather heavily, and neglected his

G wife. In July, 1930, the petitioner, at her husband's suggestion, took a temporary post in London, and in the following month, August, she took up a permanent position there, in which she has continued up to the present time. During the next 18 months Mr. Pardy continued to neglect his wife, and relations between them steadily deteriorated. Mrs. Pardy found

H this situation intolerable, and eventually a deed of separation, couched in the ordinary terms, was signed on May 30, 1932. Mrs. Pardy thereafter took up a separate abode, and has lived apart from her husband ever since.

It was a term of the deed that Mr. Pardy should pay to his wife the sum of 25s. per week. For the first 12 weeks after their separation,

Mr. Pardy paid the sum agreed upon, and then stopped payment almost entirely. The parties did not meet to converse, and the only further payments which were made by the husband to the wife appear to have been some small fragmentary sums, not exceeding £2 or £3 in all, which the husband contributed at rare intervals. From the end of the year 1934 onwards he has made no contribution at all to his wife's support. A

Immediately before the petitioner left her husband, he asked her to forgive him and to make a fresh start, but, as he did not propose, after nearly 4 years of marriage, to make a separate home of his own for her, Mrs. Pardy refused to forgive him. Twice in 1933 the respondent wrote to his wife. The first letter, which was written in January, 1933, is of an indeterminate character, asking his wife to be friends, and stating that he hopes to be able to help her shortly. The second, which is dated July 17, 1933, asks her in terms to come back to him if he is able to obtain a job. This letter contains, *inter alia*, the following expression : B

I know how deeply I have hurt you but if you will forgive me I will never give you one moment's cause to regret . . . I drove you off because I knew the crash was coming and I was so desperate then that I did anything, not caring what happened. C

To these letters Mrs. Pardy made no reply, and no further letters passed between the spouses. On July 5, 1937, the parties met again by appointment to discuss the future. Mrs. Pardy discovered that her husband was in active practice as an accountant, though he appeared to have very little money. Again, however, he made no offer of a separate home and the meeting led to no result. In the meantime, Mrs. Pardy had met a man with whom she had committed misconduct upon a few isolated occasions, and whom she is now anxious to marry. She made no mention to her husband, at their meeting in July, 1937, of the fact that she had committed misconduct, and there seems to be no reason to suppose that her husband, who took so little interest in her movements, ever suspected, much less knew of, her adultery. D

Upon these facts, as proved before me by Mrs. Pardy, it is obvious that two obstacles stand in her path against obtaining a decree. There is, in the first place, the undeniable fact of the separation deed in May, 1932, and secondly, there is the question of her own adultery. To my mind by far the most important of these two obstacles is the first, but with regard to both of them I have been greatly assisted by what I believe to be the complete truthfulness of the petitioner. Notwithstanding the fact that it must have become apparent to her whilst in the witness box that I was experiencing grave difficulty with her case, she did not at any time give me the impression either of exaggerating anything against her husband, or of minimising anything against herself in order to advance her own interests. Her discretion statement which was put before me in evidence is both a conclusive and, to my mind, a candid document, and she did not depart from it in evidence in any particular. In the circumstances, I have naturally, and I imagine rightly, approached this case with every inclination to assist the petitioner, E
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who, upon any view of the facts, has been treated most unhandsomely by her husband.

The only case that was cited to me in argument by counsel for the petitioner was a decision of my own, *Ratcliffe v. Ratcliffe* (1). I will consider the bearing of that case upon the present one in due course, but, A for reasons which will presently appear, it affords me no assistance in determining the present issue. I have considered this issue from two aspects, (i) whether or not I can look at the circumstances attending upon the first break up or division in the matrimonial home—that is to say whether or not I can go behind the deed and say that the initial division B of the parties was brought about by the desertion of the husband—and (ii) whether or not, if I am debarred from doing this, I can hold that, notwithstanding the existence of the deed, there has been such a repudiation of the deed upon both sides, and such circumstances existing for a period of 3 years immediately preceding the commencement of these C proceedings, that the husband can be held to be guilty of desertion. In order to inform myself properly upon these two aspects, I have had recourse to a number of the better-known authorities upon this subject of desertion. The first of such authorities which seems to me to have a direct bearing upon the matter in question is *Crabb v. Crabb* (2). This D case raised exactly the point whether a wife could petition for a dissolution of her marriage on the ground of desertion and adultery in the face of a deed of separation between the parties. No one to-day suggests that desertion has acquired any new meaning by reason of the fact that it is now a sufficient ground for divorce without the concomitant of E adultery. In *Crabb v. Crabb* (2), LORD PENZANCE deals with the matter as follows, at pp. 603, 604 :

The broad question raised here is, whether a woman who has quitted her husband's house under a bargain to do so, made by a deed of separation, can be said to have been "deserted without cause" by him. The proposition hardly bears stating, unless, indeed, all "separations," voluntary or involuntary, be "desertion," the F consent of complaining parties unimportant, and the person deserted, not he who was left in the common home, but she who quitted it . . . Lastly, it was said that the husband did not fulfil his part of the bargain, and only paid the £100 a year according to his covenant for one half-year. This, if a condition precedent to the covenant of the wife's trustee that she should not attempt to enforce cohabitation in this court, might, in another court, be held to relieve him from that covenant. In a word, if the husband's side of the bargain was not adhered to, the wife might G have been remitted to her original status, and set free from the prohibitions contained in the deed against enforcing those rights which in this court have never ceased to exist and lie open to her assertion. But the husband's breach of his contract could not by relation back make the actual parting involuntary, which was in fact voluntary, though the volition of the wife was moved by the husband's promises. The separation, it must always be remembered, was an act done under the deed, and though the deed be void, or its covenants afterwards broken, it would be most unjust to treat that act as if the deed had never existed. The failure of the deed cannot be H held so as to react upon the separation for which it provided, as to impress upon the separation a character entirely opposite to that which it bore at the time. If it could, it might as well be said that the wife had deserted her husband as that he had deserted her. But all this presumes the absence of fraud, for if a man, determining to abandon his wife, were to set about fraudulently, by the show of an agreement which he intended never to fulfil, to induce or extort her consent to their mutual separation, covering his true purpose under delusive covenants, and seeking a shield for his design in a consent brought by treachery, the court might well be asked to reject the false face of the transaction and regard the real object that lay underneath.

It is important to note that in spite of his strong expressions concerning the impossibility of ignoring the existence of the deed, or of putting it on one side merely because its covenants were broken, the judge does not exclude the possibility of a fraudulent or completely unreal deed behind which the court would not hesitate to go.

In the same volume some 9 months later there is reported *Fitzgerald v. Fitzgerald* (3). LORD PENZANCE uses this language, at p. 698:

I come, then, to the following conclusions as applicable to cases of this kind. No one can "desert" who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute "desertion." But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, "desertion," in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of "desertion without cause."

This decision of LORD PENZANCE, in *Fitzgerald v. Fitzgerald* (3) was cited before the Divisional Court consisting of STEPHEN and A. L. SMITH, JJ., in 1887 in *Pape v. Pape* (4), where a question arose as to whether or not a failure and refusal to carry out the terms of a deed of separation could be held to constitute desertion under the Married Women (Maintenance in Case of Desertion) Act, 1886, s. 1. STEPHEN, J., in giving the judgment of the court, says, at p. 79:

It is not necessary to give a definition of desertion. Desertion at any rate implies that the parties are living together at the time when the desertion takes place. Here they were living apart under an agreement to separate. The complaint of the respondent is really that the appellant has left off paying the money which was the consideration for the separation. The statute facilitates provision for women who have been deserted by their husbands. The respondent has not been deserted by her husband, and has no remedy under the statute. Whatever rights the parties had, apart from the statute, when the application under the statute was made, they have still.

As to these last two cases, though I would not venture in any way to criticise the validity of the decisions reached, I can only say that, for my part, I find some of the expressions employed rather too wide, or at least capable of misconstruction. I would readily agree that, in the overwhelming majority of cases, desertion in fact takes place between parties who are enjoying an existing state of cohabitation, but it does not appear to me to be beyond the bounds of quite ordinary imagination to conceive a case where the behaviour of a spouse separated under agreement could amount to desertion. If A, a husband living apart from his wife, whether under a deed of separation or under a verbal agreement between the parties, were to announce to his wife that he intended to abandon residence in England, and to break off every covenant in the deed, or every term of the agreement, thus leaving his wife completely penniless, and the wife, accepting this as a repudiation of the deed, were to proceed by way of summons before a magistrate, I cannot doubt that a magistrate

would find desertion against the husband. Moreover, if the husband, having carried out his expressed intention, were to return to this country 3 years later, I imagine that this court would not find any difficulty in granting a decree on the ground of desertion.

Furthermore, as regards *Fitzgerald's* case (3), it is instructive to note, A as was recently pointed out by SIR BOYD MERRIMAN, P., in *Jordan v. Jordan* (5), that in 1873 SIR JAMES HANNEN granted to the same lady to whom LORD PENZANCE had twice refused a divorce a decree *nisi* upon the grounds of adultery and desertion. The most detailed report of the facts proved upon this final and successful suit of Mrs. Fitzgerald B appear in the report of the case in 43 L.J. P. & M. 13. It is fairly clear from this report that SIR JAMES HANNEN acted upon a further refusal (either tacit or express) on the part of the husband to resume cohabitation with his wife, and it is entirely clear that there had been no resumption of cohabitation, such as had been laid down by LORD PENZANCE as an C indispensable prelude to desertion. It seems fair, therefore, to claim that SIR JAMES HANNEN, himself no mean authority on these matters, did not subscribe to the full doctrine enunciated by LORD PENZANCE.

All the cases which I have so far cited, and others, came up for review before the Court of Appeal in 1891 in the case of *R. v. Leresche* (6). This D case was also one under the Married Women (Maintenance in Case of Desertion) Act, 1886. LOPES, L.J., in giving the decision of the court, expressly approved of *Pape v. Pape* (4), and also approved of, and made a fairly lengthy citation from, *Fitzgerald v. Fitzgerald* (3). In applying the latter case to the case under his consideration, he said, at p. 421 :

E As was said in *Fitzgerald v. Fitzgerald* (3), desertion implied an active withdrawal from a cohabitation that exists. This brings me to the case now before the court. The husband and wife at the date of the alleged desertion were living apart under a separation deed. Cohabitation had ceased by mutual consent. It was, therefore, impossible that the husband could desert the wife. So far this case is governed by *Pape v. Pape* (4), with which decision I entirely agree.

F There can be no doubt, of course, that the Court of Appeal have adopted to the full the language of LORD PENZANCE in *Fitzgerald v. Fitzgerald* (3), and equally, of course, I recognise at once that I am bound by the decision of the Court of Appeal. The facts in *R. v. Leresche* (6), however, were that a wife claimed against her husband before magistrates on the ground G of his desertion because the husband had failed to pay under a deed, and later under a judgment founded upon the deed, and the wife having thereafter asked him to resume cohabitation the husband had refused. Again, with great respect, I would entirely agree with the decision of the court that these facts do not constitute a case of desertion, but I would H humbly have thought that this was clear, not because "the parties must be living together as man and wife when the desertion takes place," but because a parting admittedly brought about by agreement cannot be altered to a state of desertion either by the breach of a covenant in the deed of separation, or by a refusal of a request to resume cohabitation, or by a combination of these two together. Furthermore, another, and

even more simple, ground upon which this decision could have been rested was that the facts, instead of showing that the wife had accepted the husband's repudiation of the deed, showed exactly the opposite, since she has sued upon the deed. In such circumstances, the court might well have treated the request to resume cohabitation as a manœuvre whereby to force the husband into the position of being a deserter when the wife on her side had no sincere intention of returning. Again, therefore, I would, with the deepest respect, suggest that the expressions here used and adopted from *Fitzgerald's* case (3) go beyond what was necessary for the decision of the case in hand, and are too wide to be entirely accurate in every case. A

Since the passing of the Matrimonial Causes Act, 1937, I find that HODSON, J., has dealt with a point somewhat similar to that now raised before me in *Watson v. Watson* (7). In that case, the husband having deserted his wife in 1924, the parties entered into a deed of separation in 1929. The deed of separation contained a recital of an admission in terms that the husband had deserted his wife. In spite of express provisions as to payment by the husband to the wife, no substantial sum was ever paid, and indeed the husband's total contribution under the deed amounted to £4 10s. HODSON, J., found as follows, at p. 773 : B

In this case the parties did not separate under a deed at all, but because the husband deserted the wife, and the execution of the separation agreement was a mere incident in that desertion. It was not followed by the respondent observing the terms of the agreement, nor was it in any way sought to be enforced by the petitioner. C

In *Ratcliffe v. Ratcliffe* (1), which came before me, and to which I have referred, the facts as I remember them were in some respects similar to those in *Watson v. Watson* (7). I was satisfied upon the evidence that the deed of separation was not entered into in good faith by the respondent, and could therefore and ought to be treated as a similar deed was treated in *Watson v. Watson* (7)—namely, as a mere incident in what was really a case of desertion. D

From a consideration of all these cases it appears to me to result that two principles emerge ; first, that where a deed of separation has been entered into in a *bona fide* spirit between the parties, the court cannot go behind the deed to inquire into the facts which brought about the real division between the spouses, and secondly, that where spouses are living apart under a deed of separation, the relationship begun by consent cannot be changed into desertion by a mere refusal of one party to resume cohabitation or by a breach of the covenants of the deed. Such a metamorphosis could only, as I understand it, be effected by a complete repudiation by one party, which has been accepted as such by the other, in such circumstances that the proper inference to be drawn from all the facts of the case is that the spouse by whom the repudiation is being accepted is willing to return to cohabitation and is both in a position to insist on his or her conjugal rights and is in fact reasserting them. E

If, for example, in the imaginary case of A and B which I have set out F

above, the wife B at the moment of receiving her husband's repudiation of the deed and notification of intended departure, were in fact living in adultery, the court before which such facts were presented might have a different duty as to pronouncing the husband to be a deserter. I may note in passing that in the *Ratcliffe* case (1) I was careful to lay down that I would not accept the proposition that the mere fact that a husband had not kept up the payments under the deed was sufficient in all circumstances to justify a plea that the deed was therefore repudiated.

In the course of my examination of the authorities in the present case, I find that HORRIDGE, J., in 1915, in *Smith v. Smith* (8) made the following observation in language almost identical to my own, at p. 289 :

It must not be taken, where parties separate under a deed, that I should hold there has been desertion merely because the husband has failed to pay the allowance provided by the deed.

Applying the principles which I have thus extracted to the present case, I do not feel that I have any material upon which I could possibly find that the deed in the present case was not a *bona fide* agreement. It is true that, as in *Watson's* case (7) and in *Ratcliffe's* case (1), the payments made under the deed were small in amount and of short duration. It is equally true that for more than three years before the commencement of proceedings both parties had apparently ignored the deed, and neither had made any reference to their rights or obligations thereunder. Against all this, however, must be set the circumstances, first, that the highest at which the original action of the husband could be put against him is that it was a constructive desertion through continuous neglect. Further, even if it were permissible to look behind the deed, which as I have said I am satisfied cannot be done, I have doubt as to whether in all the circumstances this constructive desertion is proved. On top of this difficulty comes also the husband's request to be forgiven at the moment of parting and his subsequent letters. I can accept, I think, that his wife did not believe the letters to be genuine, but by the time she received them she was contented and settled in steady employment, and until she met him in 1937 she does not appear to have given him any opportunity of demonstrating the worth or otherwise of his professions.

Finally there is the small difficulty raised by the meeting in 1937, which, although it led to no results, appears to have been entered upon in a spirit of neutrality, if not of actual amity, in order to discuss the future. No one, I think, could blame Mrs. Pardy for the fact that after such a course of treatment from her husband her affections should by that time have become engaged elsewhere, but I cannot shut my eyes to the fact that it is additionally difficult to consider her husband as guilty of desertion, when she, who commenced her separation under the terms of the deed and ignored the overtures contained in her husband's letters does not profess at any time, or even at the meeting held for the purpose of a full and frank discussion concerning their future plans, to have made

any suggestion that their married life should be resumed. I feel, therefore, that, however reluctantly, I must in this case hold that the deed of separation bars the plea of desertion.

In case this matter should be taken further, it is perhaps right for me to say that, so far as the exercise of my discretion was concerned, I did not feel any serious difficulty. The frankness of the petitioner concerning her own conduct, and the temptation to which, upon any view of the circumstances, her husband's conduct had exposed her, were in my view sufficient reasons to justify me in granting her the discretion prayed. Neither did the question of how far the respondent's conduct might or might not have been affected by the petitioner's adultery cause me any real anxiety. Upon this side of the question I am content to follow the judgment of SIR BOYD MERRIMAN, P., in *Herod v. Herod* (9), where he used the following language, at p. 23 ([1938] 3 All E.R. at p. 731):

... it seems to me to be impossible to hold that adultery of which the deserter is proved to be entirely ignorant, or to which, if it is known, he or she is proved to be entirely indifferent, can have affected his or her own intention in the matter ...

Upon the facts of this case as I have found them, I am equally satisfied (i) that Mr. Pardy was ignorant of his wife's adultery during the 3 years immediately preceding the presentation of this petition, and (ii), that such adultery, if known to him, would have left him entirely indifferent.

Solicitors: *Robbins, Olivey & Lake* (for the petitioner).

[Reported by J. F. COMPTON MILLER, Esq., *Barrister-at-Law.*]

Re SPITZEL'S WILL TRUSTS, SPITZEL *v.* SPITZEL.

[CHANCERY DIVISION (Bennett, J.), **February 9, 10, 16, March 16, 1939.**]

Will—Forfeiture—Interests of children and grandchildren—Change of religious faith—Perpetuity—Event to be proved to the satisfaction of trustees.

The testator by his will, so far as material to the question here in issue, gave his residuary estate to his children for life and to the children or remoter issue of such children at such age as the children should appoint, and, in default of appointment, to the children of such children in equal shares. There followed a clause providing for forfeiture in the event of any child or grandchild who should forsake the Jewish faith or marry outside that faith. The forfeiture was to take effect "as from the time when the fact of such event having occurred shall be proved to the satisfaction of my trustees":—

HELD: as the moment of time specified in the will for the taking effect of such forfeiture might not arise until after the expiration of 21 years after the death of the survivor of the beneficiaries living at the death of the testator, the clause was void as infringing the rule against perpetuities.

[EDITORIAL NOTE.] The limitations of a gift must necessarily be within the perpetuity rule, and the present case shows that, where provision is made for its defeasance, that, except in certain special cases, must also be within the rule. The particular difficulty here is that the time of forfeiture is not the happening of the event itself, but the date on which the occurrence of the event is proved to the satisfaction of the trustees. Necessarily, a determinable interest cannot be divested

after its determination, and, in some cases, this consideration will save the provision from the operation of the rule, but, in the present case, the forfeiture could, apart from the rule, be enforced at a date beyond the period allowed by the rule.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 25, pp. 158, 159, paras. 268-273; and FOR CASES, see DIGEST, Vol. 37, pp. 119-122, Nos. 517-545.]

A Cases referred to :

(1) *Bennett v. Bennett* (1864), 2 Drew. & Sm. 266; 37 Digest 85, 237; 34 L.J.Ch. 34; 11 L.T. 362.

(2) *Re Staveley, Dyke v. Staveley* (1920), 90 L.J.Ch. 111; 37 Digest 119, 517; 124 L.T. 466.

(3) *Portman v. Portman (Viscount)*, [1922] 2 A.C. 473; 44 Digest 949, 8032; 91 L.J.Ch. 708; 128 L.T. 129; *affg. S.C. sub nom. Re Harcourt, Portman v. Portman*, [1921] 2 Ch. 491.

B

ADJOURNED SUMMONS to determine whether or not a certain clause contained in a will was void as infringing the rule against perpetuities.

G. D. Johnston for the plaintiffs.

C

C. R. R. Romer, K.C., and *M. R. C. Overton* for the first two defendants.

B. Hall for the third and fourth defendants.

A. J. Belsham for the fifth and ninth defendants.

E. Rivière for the sixth defendant.

Hon. Denys B. Buckley for the seventh defendant.

D

A. G. Coulson for the eighth defendant.

Andrew Clark for the tenth defendant.

I. G. H. Campbell for the last defendant.

E BENNETT, J. : The question for decision on this summons is as to the validity of a condition for forfeiture contained in the will of the late Mr. Louis Spitzel. His will was made on May 9, 1906, and he died on Sept. 5, 1906. Probate of his will was granted to the plaintiffs on Oct. 9, 1906. The relevant clauses of the will are set out in the affidavit of Samuel Spitzel. By cl. 8 of his will the testator

F . . . devised and bequeathed his residuary estate to his trustees upon the usual trusts for sale collection and conversion payment of funeral and testamentary expenses debts legacies and annuities and investment of the net proceeds and by cl. 9 declared that his trustees should divide the said residuary moneys investments and the property representing the same into 162 equal parts or shares and should appropriate 20 of such parts or shares to or in respect of his wife 25 of such parts or shares to or in respect of [the plaintiff] 23 of such parts or shares to or in respect of each of his sons John, Martin, and Cecil and 16 of such parts or shares to or in respect of each of his daughters Jeanette, Eva, and Lillie and whether his said wife and children should respectively survive him or not.

G

Then by cl. 10 the testator declared :

. . . that his trustees should stand possessed of his wife's share upon trust to pay the income thereof to his said wife during her life and from and after her death his trustees should stand possessed of her share and the future income thereof in trust to divide the same amongst and by way of addition to the shares of his said children thereinbefore named in the proportions which the shares bore to one another under and by virtue of the last preceding clause thereof or as near thereto as possible but so that the part thereof so added to the share of each child of his should be held upon the trusts thereinbefore declared of and concerning his or her original share.

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By cl. 11 the testator declared :

. . . that his trustees should hold the share of each of his said children upon trust

during the life of such child to pay to him or her the income of his or her share and so that as regarded any daughter of his the same should during coverture be for her separate use without power of anticipation and after the death of such child should hold his or her share and the future income thereof upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of such child at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for their respective benefits and such provisions for their respective advancement maintenance and education and in such manner in all respects as such child should from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment as aforesaid in trust for all or any the children or child of such his child (living at his death or born afterwards) who being male should attain the age of 21 years or being female should attain that age or marry and if more than one in equal shares with the usual hotchpot clause.

By cl. 12 the testator provided :

. . . that in case any child of his (being a son or unmarried daughter) should at any time alienate or charge or affect to alienate or charge the income of his or her share or any part thereof or in case by reason of any act or event (whether happening before or after the decease of the testator) (not being merely a consent to the exercise of the power of advancement thereafter contained) the said income or any part thereof should or but for that proviso would become vested in or charged in favour of some other person or persons or a corporation then the trust thereinbefore contained for payment of the said income to such child of his should immediately thereupon cease and become void and the testator declared discretionary trusts during the remainder of the life of such child.

Clauses 13 and 14 of the will, upon which the question for decision really depends, are in the following terms :

13. Provided also and I declare that notwithstanding anything hereinbefore contained if either during my lifetime or after my decease any son or daughter of mine or any grandchild of mine who shall not have acquired an absolute interest in possession in my residuary estate shall forsake the Jewish religion and adopt any other religion or shall marry a person not professing the Jewish religion or a person not born a Jewess or Jew although converted to Judaism and professing the Jewish religion then and in every such case and as from the time when the fact of such event having occurred shall be proved to the satisfaction of my trustees such son or daughter or grandchild and his or her issue shall absolutely forfeit and lose all share interest and right of participation of and in my residuary estate and the income thereof and the trusts herein declared and contained of and concerning his or her share or interest shall absolutely cease and determine. 14. And I declare that in the event of the failure or determination from any cause whatever of the trusts herein declared and contained of or concerning the share of any child of mine such share as well as any share or shares accruing or added thereto by virtue of this clause or any other accruer provision contained in this my will and the income thereof or so much thereof respectively as shall not have been applied or disposed of under the trusts or powers herein contained or by law vested in my trustees shall go and accrue by way of addition to the shares of my other children in said trust premises in the proportions which such shares bear to one another according to the direction for division of my residuary estate hereinbefore contained or as near as possible thereto and so that every such accruing share shall be held upon the trusts and subject to the powers and provisions herein contained concerning the original share or shares to which the same shall be added or as near thereto as circumstances will admit.

The real question to be decided is whether the conditions for forfeiture contained in cl. 13 of the testator's will are valid. It is to be observed that forfeiture does not take place at the moment of time when a son or daughter or grandchild of the testator does one of the acts set out in the clause. That moment of time must necessarily arise within a period of time starting with the death of the testator and ending with the expiration of 21 years from the date when the last survivor of his children dies. The forfeiture takes place at the moment of time when it is proved to the satisfaction of the testator's trustees that a child or grandchild of

his has done one of the things set out in the clause, and that moment of time may not arise until after the death of all the testator's children and the expiration of a period of 21 years from the date of the death of the last survivor of them—that is to say, after the expiration of a period of time measured by the lives of the testator's children and a period of 21 years. It is contended that the condition is void because it may operate after this period of time. I decide that it is void because it may so operate.

In my judgment, a condition framed for the purpose of divesting a vested interest infringes the rule against perpetuities, and is void if its terms are such that, if valid, it might operate at a date after a period of time measured by a life or lives in being when the instrument containing the condition comes into operation and the expiration of 21 years after such life or lives. This proposition is, in my judgment, established by the decisions in *Bennett v. Bennett* (1), *Re Staveley, Dyke v. Staveley* (2) and *Portman v. Portman (Viscount)* (3), and I so answer the question.

Declaration that clause void as infringing rule against perpetuities.

Solicitors: *Michael Abrahams, Sons & Co.* (for the plaintiffs); *Simmons & Simmons* (for the sixth, seventh, eighth, ninth, tenth and last defendants); *Boxull & Boxall* (for the first, second, third and fifth defendants); *Reid Sharman & Co.* (for the fourth defendant).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

GERAGHTY v. MORRIS.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Macnaghten and Singleton, JJ.), **March 29, 1939.**]

Street and Aerial Traffic—Driving-test regulations—Test conducted in accordance with regulations—Jurisdiction—Road Traffic Act, 1934 (c. 50), s. 6 (6).

The respondent, in pursuance of certain regulations made under the Road Traffic Acts, submitted himself to a test of competence to drive a motor vehicle. The test was conducted by the appellant, a driving-test examiner appointed by the Minister of Transport, who was not satisfied that the respondent was competent to drive without danger to and with due consideration for other users of the road a vehicle of the same class or description as that on which he was tested. Thereupon, pursuant to sect. 6 (6) of the Act of 1934, the respondent applied to a court of summary jurisdiction to determine whether or no the test was properly conducted in accordance with the regulations. On behalf of the appellant, it was contended that the jurisdiction conferred on the magistrate by sect. 6 (6) of the Act of 1934 was limited merely to an inquiry whether or not the test was conducted by an authorised person in conformity with the regulations, and did not give any right of appeal whatever against the decision of a duly appointed examiner who had conducted a test in conformity with the regulations, and that, as there was no evidence that the test was not conducted in conformity with the regulations, the complaint should be dismissed. On behalf of the respondent, it was contended that the provisions of sect. 6 (6) enabled the magistrate to inquire into the circumstances of the test itself and to determine whether or not the appellant was justified in refusing to pass the respondent, and had acted reasonably in so doing, and had conducted the test properly in accordance

with the regulations, and that otherwise the word "properly" in the subsection would be unnecessary and mere surplusage. The magistrate found as a fact that the test was conducted by the appellant in accordance with the regulations, but upheld the contentions on behalf of the respondent, and ordered that, as a proper decision as a result of the test had not been reached in accordance with the regulations, the respondent should be eligible to submit himself for another test before the expiration of the prescribed period. Thereupon this appeal was brought :—

HELD : the magistrate's decision was wrong, as it was at variance with his finding of fact that the test was conducted by the appellant in accordance with the regulations. The complaint should, therefore, be dismissed, and the magistrate's order quashed.

[EDITORIAL NOTE.] The question upon this appeal was whether the magistrate had any jurisdiction to inquire further into the matter than to ascertain that the test was conducted in accordance with the regulations. The court has decided that the terms of the Act must be strictly followed, and that there was, therefore, no jurisdiction to inquire into the correctness of the examiner's decision as a result of the test, and, provided the regulations had been properly observed, the decision of the examiner was final.

AS TO DRIVING TESTS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 782-784, paras. 1223-1225 ; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 188b, 188c.]

APPEAL by way of case stated from a decision of a stipendiary magistrate being a court of summary jurisdiction sitting at the Manchester City police court. In pursuance of certain regulations made under the Road Traffic Acts, the respondent submitted himself for a test of competence to drive a motor vehicle. The appellant, a driving-test examiner appointed by the Ministry of Transport, conducted the test, but was not satisfied as to the respondent's competence. Thereupon, pursuant to the Road Traffic Act, 1934, s. 6 (6), the respondent applied to a court of summary jurisdiction for a determination of the question whether or not the test was properly conducted in accordance with the regulations. The magistrate found as a fact that the test was conducted by the appellant in accordance with the regulations, but upheld the respondent's contention that it was within the magistrate's jurisdiction to inquire into the circumstances of the test itself and to determine whether or not the appellant was justified in refusing to pass the respondent, and had acted reasonably in so doing, and had conducted the test properly in accordance with the regulations. He held that, if it were otherwise, the word "properly" in the subsection would be unnecessary and mere surplusage. Accordingly, the magistrate ordered that, in failing to pass the respondent, the appellant had not conducted the test properly in accordance with the regulations, and that the respondent should be eligible to submit himself for another test before the expiration of the prescribed period.

Valentine Holmes and *H. P. J. Milmo* for the appellant.

The respondent was not represented.

LORD HEWART, L.C.J. : In para. 5 of the case stated, it is found as a fact that :

... the said test was conducted by the appellant in accordance with the said regulations.

In other words, the requirements of the statute were fulfilled. The Road Traffic Act, 1934, s. 6 (6), provides as follows :

A court of summary jurisdiction acting for the petty sessional division in which a person who has submitted himself for a test of competence to drive resides shall have power on the application of that person to determine whether the test was properly conducted in accordance with the regulations . . .

- A It is found as a fact that the test was conducted in accordance with the regulations. Nevertheless, it was contended on the part of the appellant that the jurisdiction of the magistrate was limited merely to an inquiry as to whether or not the test was conducted in conformity with the regulations, and did not give a right of appeal against the decision of a duly appointed examiner who had conducted a test in conformity with the regulations. On the other hand, it was contended on the part of the respondent, that there was a general right of appeal, and that the magistrate was enabled to inquire into the circumstances of the test itself, and to determine whether or not the appellant was justified in failing to pass the respondent. Having heard the evidence and the arguments, the magistrate actually came to the conclusion that the contention of the respondent was correct, and he was satisfied that, in failing to pass the respondent, the appellant had not conducted the test properly in accordance with the regulations, and that she ought to have been satisfied that the respondent was competent to drive. It would, indeed, be a deplorable state of affairs if that sort of view could prevail. There are no limits to the amount of litigation which might conceivably be brought about. In my opinion, the decision was plainly wrong, and is flatly at variance with the finding of fact in the case that the test was conducted by the appellant in accordance with the regulations. I think, therefore, that this appeal ought to be allowed.

MACNAGHTEN, J. : I am of the same opinion.

SINGLETON, J. : I agree.

F *Appeal allowed.*

Solicitor : *Treasury Solicitor* (for the appellant).

[Reported by MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

G FYFE v. IRWIN.

[HOUSE OF LORDS (Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Romer), **February 24, 27, March 30, 1939.**]

H *Wills—Construction—Rule in Lassence v. Tierney—Life interests with remainder to issue and accruer clause on failure of issue—Last survivor dying without issue—Whether original share of last survivor absolutely vested.*

The testator gave his residuary estate to be divided equally *per stirpes* among all his children except one named child, and the families of such of those children as should have died leaving issue. The division was to take place on the eldest child attaining majority, or, if such

child were a daughter, on her being married before her majority, and from the time of such division the share of each child was to be charged with an annuity of £150 in favour of the testator's wife. The trustees were then given an option to pay the sons' shares to them upon attaining 21 or to retain the same until those sons attained 24 years of age. The daughters' shares were then settled upon them and their children, with an accruer clause in the event of a daughter dying without leaving issue surviving. The testator then declared that the shares should vest in and belong to the children respectively upon their attaining majority, or, in the case of daughters, upon their marrying before that age, and, in the event of any of the children dying before acquiring a vested interest and without leaving issue, the shares were to accrue to the remaining shares. Upon an application to the court in 1928, it was held that the interest of each daughter was restricted to an alimentary liferent, and that the fee of the share of residue liferented by any daughter who might die without leaving issue surviving passed absolutely to the other residuary legatees. In the events which happened, the last survivor was a daughter, who died a spinster in 1936. The question then arose whether the original share of the survivor was vested absolutely in her or whether it passed as on an intestacy:—

HELD : the survivor, upon attaining 21 years of age, became entitled to a vested right in the fee of her original share, subject to defeasance only in the event of her leaving issue or in the event of her not being the last survivor of the residuary legatees, and, in the events which had happened, her original share vested absolutely in her.

[EDITORIAL NOTE.] The rule in *Lassence v. Tierney* (1) was stated by LORD COTTENHAM, L.C., with reference to a restriction of the mode of the legatee's enjoyment for the benefit of the legatee. This statement is far too narrow, and it is immaterial whether the restriction is imposed for the benefit of the legatee or for the benefit of third parties. The rule is one designed to reconcile two inconsistent dispositions, and in doing so it limits the modification of the absolute gift to such as is necessary to give effect to the trusts engrafted upon it. This aspect of the rule is fully considered in the opinion delivered by LORD ROMER, from which it will appear that the law to be applied in the present case is the same both in England and in Scotland.

AS TO RULE IN *Lassence v. Tierney*, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 673, 674, para. 1289; and FOR CASES, see DIGEST, Vol. 44, pp. 554-556, Nos. 3714-3724.]

Cases referred to :

- (1) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 43 Digest 643, 790; 15 L.T.O.S. 557.
- (2) *Donaldson's Trustees v. Donaldson* (1916), S.C. (H.L.) 55; 44 Digest 553, case *n*.
- (3) *Hancock v. Watson*, [1902] A.C. 14; 43 Digest 644, 792; 71 L.J.Ch. 149; 85 L.T. 729; *affg.* S.C. *sub nom.* *Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482.
- (4) *Fraser v. Fraser's Trustee* (1883), 11 R. (Ct. of Sess.) 196.
- (5) *Wallop v. Darby* (1611), Yelv. 209.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland, dated May 20, 1938. The facts and the arguments are fully set out in the opinion of LORD RUSSELL OF KILLOWEN.

Charles Mackintosh, K.C., and *Hector McKechnie* for the appellants.

J. R. Wardlaw Burnet, K.C., and *J. R. Philip* for the respondents.

A LORD THANKERTON : My Lords, I have had the privilege of considering the opinion of my noble and learned friend LORD RUSSELL OF KILLOWEN, and I find myself in complete agreement with it. I desire to add only a few observations. On the appellants' first contention—that Flora, as the survivor of the residuary legatees, was entitled to the fund—it is clear that this point did not arise in the circumstances of the previous special case in 1928. The question then considered was whether the word “other” in the final destination-over implied the qualification of survivance, and it was held that it did. It did not affect the import of that word as requiring that the survivor must be someone
B other than the daughter whose death occasioned the succession, and the opinion of LORD BLACKBURN, as my noble and learned friend LORD RUSSELL OF KILLOWEN states, makes this certain.

C On the appellants' alternative contention, it is settled that the principle of construction which is known as the rule in *Lassence v. Tierney* (1) applies in Scotland (*Donaldson's Trustees v. Donaldson* (2)), and the correct exposition of the rule is found in the opinion of LORD DAVEY in *Hancock v. Watson* (3), at p. 22. Further, as stated by my noble and learned friend LORD RUSSELL OF KILLOWEN, it is settled that every destination-over, whether to issue or strangers, may be equally regarded as “trusts
D engrafted” on an original absolute gift, as is shown by *Hancock v. Watson* (3) and *Fraser v. Fraser's Trustee* (4). In the latter case, LORD SHAND stated, at p. 201 :

E In the deed the testator declares that these shall be provisions primarily in favour of his daughters and their children, and that on their failure they were to revert to the surviving brothers and sister. In such a case I think the court should lean to the construction of the deed which would give effect to that intention, and not to the construction which would cause a lapse. The contention of the proprietor of this estate would lead to the anomaly that although either sister could succeed to the provision which belonged to the other, yet that neither could in any event deal *mortis causa* with her own provision.

F This statement not only illustrates the reasoning which led to the rule in *Lassence v. Tierney* (1), but is very pertinent to the present case. On the question of construction here, I agree entirely with the reasoning of my noble and learned friend LORD RUSSELL OF KILLOWEN, and I will only add that I find myself unable to agree with the construction of the
G sixteenth purpose expressed by Lord President CLYDE in the 1928 case and adopted by Lord President NORMAND in the present case, which would limit its application, in regard to the provisions in favour of daughters, to their liferent interests. I agree with my noble and learned friend LORD RUSSELL OF KILLOWEN that this purpose is clearly dealing with the capital of these shares.

H I have also had the privilege of considering the opinion about to be delivered by my noble and learned friend LORD ROMER, and I desire to express my concurrence in it. I agree with the order proposed by my noble and learned friend LORD RUSSELL OF KILLOWEN.

LORD RUSSELL OF KILLOWEN : My Lords, the relevant facts which have led to this appeal are as follow. Ronald Livingston of Drimsynie

made a trust disposition and settlement (which I will refer to as the will), dated Sept. 4, 1868, and died in 1871. He left him surviving his widow, and five children—namely, two sons, Ronald and Alastair, and three daughters, Mary, Emily and Flora. By the will, after providing for certain legacies and annuities, including an annuity for his widow, the testator directed his trustees to pay the sum of £20,000 to Ronald on his attaining the age of 24 years. The thirteenth, fourteenth, fifteenth and sixteenth purposes of the will were framed in these terms :

THIRTEENTH the whole residue and remainder of my means and estate heritable and moveable real and personal and accumulations thereon and lapsed provisions annuities and legacies if any shall be divided equally *per stirpes* among my whole children (other than the said Ronald John Macdonald Livingston) and the families of such of my children as shall have died leaving lawful issue and I direct the said division to take place on the eldest of said residuary legatees attaining majority or if a daughter being married before majority and from and after said period of division the shares of each of my children shall be severally charged with the allowance at the rate of £150 per annum paid to my said wife in respect of each such child as above written and with any other charges and expenses that may be incurred by my trustees on his or her behalf FOURTEENTH my trustees shall in their option pay over to each of my sons if any other than the said Ronald John Macdonald Livingston his share of residue and accumulations upon his attaining majority or retain the same until he attain the age of 24 years complete and then pay it over and in the latter event my trustees shall periodically as and when the same shall become due pay over to each such son the income and revenue of his share of my estate accruing since his majority FIFTEENTH my trustees shall hold administer and manage the share or shares of my estate original and accruing to which each or any daughter of mine shall become entitled under these presents and shall pay over the yearly income and revenue thereof as and when the same shall become due and not by way of anticipation into the proper hands of each such daughter to be enjoyed by her as an inalienable personal alimentary provision free from the *jus mariti* right of administration or other control whatsoever of any husband she may marry and not affectable by her own or such husband's debts deeds or obligations or the attachments diligence or execution of her or his creditors the receipts of each such daughter alone without any consent whatever being sufficient discharges to my trustees for said income and upon the death of each such daughter my trustees shall retain such share or shares for behoof of the lawful issue of such daughter in such manner as she shall by any deed or will appoint and failing such appointment then for behoof of such issue equally *per stirpes* and failing issue then for behoof of my own other residuary legatees under these presents and I declare that in the event of and upon any such my daughter's marriage it shall be competent to my trustees in the exercise of their discretion to pay to her out of the capital or accumulated revenue of her share of my estate any sum of money not exceeding £500 sterling for the purpose of defraying the expense of her outfit and also to assign and transfer her share or shares of my estate to the trustees under any ante-nuptial marriage contract or settlement in contemplation of marriage upon trust for the same purposes as my trustees are directed to hold and retain the same by these presents SIXTEENTH I declare that the legacies shares of residue and other provisions herein contained in favour of my children shall vest in and belong to them respectively upon their attaining majority or in the case of daughters marrying before said age upon such marriage and in the event of any of my children dying before acquiring a vested interest and without leaving lawful issue the shares of my estate that would have fallen to such deceasing child had he or she survived shall accresce to and form part of the residue of my estate divisible in manner before mentioned.

The widow died in 1897. Ronald died in 1926, without ever having had issue. His legacy of £20,000 had been duly paid to him. After Ronald's death—namely, on Aug. 2, 1927—a special case was presented to the Court of Session to which the trustees of the will were first parties, the three daughters were second parties, and the son Alastair was third party. At that time, the position of affairs was that Alastair had been paid his one-fourth share of residue, the three daughters had all attained

the age of 21 years, Mary was married, and had had only one child, a daughter who had died in 1918, aged 28 years, and Emily and Flora were spinsters. The daughters and Alastair desired to ascertain their respective interests under the will, and to that end they submitted for the opinion and judgment of the court 6 questions of law :

- A (1) Did the fee of the one-fourth share of residue set aside for each of the second parties vest in them on their attaining majority ? or (2) Is the interest of each of the second parties restricted to an alimentary liferent ? (3) Did the fee of the one-fourth share set aside for each of the second parties vest in the third party on his attaining majority subject to defeasance in the event of her leaving issue ? (4) In the event of the interest of each of the second parties being restricted to an alimentary liferent, does the fee of her share vest in her issue at birth ? (5) Does the fee of the share of residue liferented by any of the second parties who may die without issue fall (a) absolutely to the other residuary legatees who attained majority, or (b) to be divided and added to the shares of the other legatees who attained majority, and enjoyed by them in the same manner as their original shares ? (6) Does the fee of the share of residue liferented by any of the second parties who may die without issue fall (a) absolutely to the residuary legatees who may survive and the issue of any who may have predeceased leaving issue, or (b) to be divided and added to the shares of the surviving residuary legatees and the issue of any who may have predeceased and enjoyed by them in the same manner as their original shares ?

- From an interlocutor pronounced by the First Division on Feb. 18, 1928, it appears that their Lordships answered the second question and branch (a) of the fifth question in the affirmative and all the remaining questions in the negative. It was thus decided (i) that the interest of each daughter was restricted to an alimentary liferent, and (ii) that the fee of the share of residue liferented by any daughter who might die without issue fell absolutely to the other residuary legatees. From the opinions delivered, it is clear that these "other residuary legatees" were to be confined to those who survived the deceasing daughter whose share would be in question, and that the words "failing issue" were to be construed as meaning "without leaving issue surviving."

- Alastair died in 1933. Mary died in 1934 without having had any issue except as above-mentioned. Emily died a spinster in the following year. In accordance with the above decision of the First Division, the one-fourth share of residue liferented by Mary was, on her death, divided equally between Emily and Flora, and, on Emily's death, the one-fourth share liferented by her was paid over to Flora. Flora died a spinster on Dec. 17, 1936, and the question then arose as to who was entitled to the one-fourth share of residue liferented by her. That was a question which had not been decided by the interlocutor of the First Division, although it had been contemplated by LORD BLACKBURN in the opinion delivered by him when he used these words :

- Returning to the construction of the fifteenth purpose, it may easily happen that the last surviving residuary legatee will be one of the daughters themselves, in which case it might well be argued that, the whole class of "other residuary legatees" having failed, the surviving daughter had acquired before her own death a vested right to her share "original and accruing," subject only to defeasance in the event of her being survived by issue. This question may never arise. . . . Accordingly, I do not express any opinion upon it.

The question having arisen on Flora's death, the trustees of the will instituted an action of multipointing as pursuers and real raisers,

in which they called as defenders, first the representative of Mary, second the trustees of the will of Emily, third the trustees of the settlement of Flora, and fourth the judicial factor on the estate of Ronald. The testator's heirs *ab intestato* were his five children. The defenders first, second, and fourth called represented the interests of the four children other than Flora, and claimed that the fund *in medio* was, in the events which had happened, undisposed of, and fell to be divided among the testator's heirs in intestacy, or their representatives. The defenders third called claimed that the fund *in medio* belonged to Flora, and fell to be paid to them as her trustees. The Lord Ordinary (by interlocutor dated Jan. 8, 1938) found that Flora's trustees were entitled to be ranked and preferred to the whole of the fund *in medio*, and that the claims of the other claimants fell to be repelled. The second and fourth named defenders reclaimed against that interlocutor, and on May 20, 1938, the judges of the First Division pronounced an interlocutor by which they recalled the Lord Ordinary's interlocutor and found (to put it shortly) that the said one-quarter share of residue had become intestate estate of the testator. The trustees of Flora now appeal to your Lordships' House and ask that the interlocutor of May 20, 1938, be reversed (except *quoad* expenses), and to be ranked and preferred to the whole fund *in medio*.

My Lords, those being the facts relevant to this appeal, I think it right to make it plain that the case was presented to us, and argued before us, upon the footing that all parties accepted as beyond question the correctness of the decision which was reached by the First Division on Feb. 28, 1928, and in accordance with which the trustees acted on the respective deaths of Mary and Emily. I am content that we should deal with this appeal upon that footing, provided it be understood that this House is not thereby expressing any opinion upon the points which were then under consideration.

The present claim by Flora's trustees was based on two alternative contentions. The first was that Flora was entitled under the words of the final destination-over in the fifteenth purpose: "for behoof of my own other residuary legatees under these presents." Flora, it was said, was the survivor of the residuary legatees, and, since "other" was to be read as "survivor," she was entitled to the fund as the survivor of the residuary legatees. Alternatively, she claimed under the doctrine of initial gift of the fee, which in England is often known as the rule in *Lassence v. Tierney* (1), upon the footing that there was an absolute gift to her in the first instance of the fee of one-fourth share of residue upon which trusts had been engrafted which had all failed, with the result that the original gift of fee survived. That the rule in *Lassence v. Tierney* (1) is part of the law of Scotland is clear from the decision in your Lordships' House of *Donaldson's Trustees v. Donaldson* (2). On the other hand, those interested in claiming an intestacy contended that the final destination-over had failed, since the "survivor" thereunder,

must be someone who had survived the daughter whose death was in question, and that the rule in *Lassence v. Tierney* (1) did not apply, either because there was no original gift of the fee of one-fourth share or because, if there were, the rule had no application where there was a destination-over in favour of persons other than issue of the liferenter.

- A The Lord Ordinary declined to apply the rule in *Lassence v. Tierney* (1), on the ground that it is limited in its application to cases in which there is an initial absolute gift to a legatee and a subsequent direction that the provision is to be held for him in liferent and his issue in fee. He had not, he said, been referred to any case in which the rule had been applied
- B where the testator (as here) had contemplated the possibility of a daughter dying without leaving issue, and had made provision for that eventuality by a destination-over of the fee. He held, however, that Flora's trustees were entitled, on the ground, as I understand his judgment, that, on the death of Emily, the fee vested in Flora under the final destination-over as the ultimate survivor of the residuary legatees, though subject to defeasance. The Lord President disagreed with the Lord Ordinary's construction of the final destination-over, upon the ground that a daughter whose death has raised the question as to the disposition of her share must necessarily be excluded from taking under the final destination-over, and he held that the rule in *Lassence v. Tierney* (1) could not apply, because, upon the true construction of the will, there was no initial gift to Flora of the fee of a share of residue. The other members of the court took the same view.

- My Lords, I am in agreement with the First Division in rejecting the
- E ground upon which the Lord Ordinary decided the case in favour of the present appellants. The one person, it seems to me, who cannot possibly take any interest under the trust contained in the final destination-over is the residuary legatee upon whose death that trust is to come into operation. Upon the question of initial gift, however, the case is otherwise. I am of opinion that, upon its true construction, the will does contain an initial gift of fee to Flora, and that the rule in *Lassence v. Tierney* (1) does apply. Upon this point, two questions were argued before us on behalf of the respondents. It was first said that, even assuming that the will contained an absolute gift to Flora in the first
- G instance, the rule in *Lassence v. Tierney* (1) did not apply in the present case because there was, in addition to the destination-over on Flora's death to her issue, a further destination-over failing issue to other persons. For myself, I can see no justification for this contention, either on principle or on authority. As to principle, every destination-over,
- H whether in favour of issue or of strangers, seems alike, whether as regards its effect upon, or its inconsistency with, or its relation otherwise to, the original absolute gift. To the extent to which it takes effect, it hinders the operation of that absolute gift, and there seems no reason why, when the hindrance disappears, the original gift should not operate as much in the one case as in the other. As to authority, it seems both

in England and in Scotland to be against the respondents. It is true that in *Lassence v. Tierney* (1) LORD COTTENHAM, L.C., in speaking of the engrafted trusts, speaks of them as engrafted for the benefit of the legatee, but LORD DAVEY, in *Hancock v. Watson* (3), with the approval of the other members of this House, stated the rule in the widest terms and as settled law thus, at p. 22 :

... if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be.

In point of fact, *Hancock v. Watson* (3) was itself a case in which there was a destination-over on the death of the legatee in favour of her children, followed by a destination-over, in default of such issue, to other persons. The legatee never had any children, the second destination-over was void for perpetuity, and the original absolute gift to the legatee was held to prevail under the rule. If authority in the Scottish courts be needed, it will be sufficient to cite *Fraser v. Fraser's Trustees* (4). It is, in my opinion, impossible on principle or authority to hold that, assuming an initial gift of fee to a legatee, the existence of a destination-over not in favour of the legatee's issue will exclude the application of the doctrine of initial gift on the failure of the engrafted trusts. Counsel for the respondents I think appreciated this, and in his reply relied upon the existence of such a destination-over mainly, if not solely, for the purpose of establishing, or assisting him in establishing, that, as a matter of construction of the will, there was no initial gift of fee to Flora. This leads me to a consideration of what seems to me the real point in the case—namely, whether the will contains such an initial gift. LORD MONCRIEFF expressed the view that the point had been already decided by the First Division in the opinions delivered on the special case, presumably by their answers to the first and second questions. LORD FLEMING did not put the matter higher than that the opinions contained *dicta* favourable to his view. The Lord President thought that, while the point was not in the 1928 matter for decision, the opinions did contain observations tending to exclude the idea that there was an original gift of fee to the daughters. For myself, the only indication which I can find in those opinions of this matter having been considered on that occasion is the passage which I have already cited from the opinion of LORD BLACKBURN, in which the very point is kept wide open. In truth, the main question which was being considered was a claim by the daughters (set forth in para. 10 of the special case) then to be entitled each to immediate payment of a one-fourth share of residue, on the footing that it vested in her absolutely on attaining the age of 21 or marrying, and became payable on the eldest of the residuary legatees attaining the age of 21 or (if a daughter) marrying. I find it difficult to see how this contention can have been advanced without a complete disregard of the fifteenth purpose, but, however that may be, the decision amounted to

no more than that the claim to immediate payment could not be sustained, and that all that any daughter could at the time claim to have paid to her was the income of a one-fourth share of the residuary estate directed to be divided by the thirteenth purpose. The question which we now have to decide did not require to be decided, nor were the opinions

A delivered with that particular question in view.

In considering in the present action the question whether the will contains an initial gift of fee to the daughters, their Lordships of the First Division have arrived at their conclusions on various grounds.

B The Lord President relied substantially upon an alleged contrast between the disposition of residue in favour of Alastair and the disposition in favour of the daughters. He thought that, while the thirteenth purpose contained no gift to anyone, but merely brought about an arithmetical division, there was a gift of the fee to Alastair provided for by the direction to pay in the fourteenth purpose, and the vesting declaration in the

C sixteenth purpose, whereas in the case of the daughters there was no direction to pay anything but the income for life under the fifteenth purpose, and the vesting declaration in the sixteenth purpose only related, in the case of daughters, to that liferent. LORD FLEMING said that he was unable to find in any provision of the will any sub-

D stantial support for the idea that the direction to divide was intended to operate as a gift of fee to the daughters, and he relied, I think, to a great extent upon the presence of the final destination-over as an aid in construction. LORD MONCRIEFF held that the thirteenth purpose could not be interpreted as conferring a gift of the fee on three separate

E grounds—namely, (i) the presence of the final destination-over, (ii) the frame of the sixteenth purpose, and (iii) the binding effect of the earlier decision of the First Division. Whether all and each of these points of view commended themselves to LORD CARMONT is uncertain. He simply concurred.

F It is noticeable that no specific reference is made in any of the judgments to phrases which abound in the will and which point strongly in favour of an initial gift of fee to daughters having been intended by the testator. They cannot, however, have been overlooked in judgments which purport to be based on consideration of the will as a whole.

G There are, however, three fundamental points upon which, in my opinion, the Lords of the First Division have erred. In the first place, the thirteenth purpose by its wording does far more than merely provide for an arithmetical division. It directs that property should be divided among children, making no distinction between sons and daughters,

H and it thereby constitutes a gift of fee alike to daughters and to sons (other than Ronald). Indeed, unless there is contained in the thirteenth purpose a gift of fee to sons (other than Ronald), there is no such gift in the will. The fourteenth purpose (and this is the second matter of error) contains no such gift. It assumes that such a gift has already been made, and that a son has been given an *aliquot* share by the thirteenth

purpose, and it merely provides (ineffectually, no doubt) that the trustees shall have an option as to when that *aliquot* share shall be paid over. The same is true of the sixteenth purpose. It deals with "shares of residue" already given, and it draws no relevant distinction between the shares of residue of sons and the shares of residue of daughters. Moreover (and this is the third matter of error), it deals with the fee of shares of residue, and the fee only, for it provides that the subject-matter with which it is concerned should in certain events accresce to, and form part of, the residuary estate, a provision impossible of application to an interest for the life of a deceased child. A

Having cleared away these misconceptions, let me now approach the question of construction. The proper method of approach is thus stated in *Hancock v. Watson* (3), at p. 22: B

... if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. C

As, in my opinion, the terms of the thirteenth purpose are unambiguous, and plainly confer an initial gift of fee on the daughters, it might be argued that, in accordance with the above statement, the other parts of the will need not enter into consideration. I prefer, however, to consider them, and, when I do so, I find that they corroborate the construction of the thirteenth purpose, which, even without their assistance, appears to me clear. As I have already said, the fourteenth purpose assumes that a gift of fee has been conferred on sons in the thirteenth provision, and the words of the thirteenth purpose which provide for sons are the identical words which make provision for daughters. The fifteenth purpose refers to "the share . . . of my estate . . . to which each . . . daughter of mine shall become entitled under these presents," to "such share," and to "her share of my estate," and each time in such terms and context that the testator can only mean the fee. Finally, I find the testator in the sixteenth purpose referring to the "shares of residue" of his daughters in a clause which, from its terms, can only be dealing with gifts of fee. It is said that the final destination-over is an element to be taken into account, but I confess to a difficulty in appreciating its exact weight. I suppose that, if framed so as apparently to exclude the taker of the first liferent in all possible events, it might turn the scale against the view that there was an initial gift of fee in an ambiguous clause, but, in the present case, the final destination-over is not of this character, and its weight is as nothing when put in the scale against the other features of the will which I have indicated, and which support the view of an initial gift of fee. F G H

My Lords, for these reasons I am of opinion that, upon the true construction of the will, Flora, on attaining the age of 21 years, became entitled to a vested right in the fee of a one-fourth share of the testator's residuary estate, subject to defeasance only in the event of her leaving issue, or in the event of her not being the last survivor of the testator's

four residuary legatees, and that, accordingly, in the events which have happened, her trustees are entitled to the fund *in medio*. I would reverse the interlocutor of the First Division, and restore the Lord Ordinary's interlocutor. All parties before your Lordships' House were willing that the costs of this appeal should be taxed as between solicitor and client and paid out of the fund, and, in my opinion, this is a proper case in which to adopt that course.

LORD ROMER : My Lords, it sometimes happens that a will contains two dispositions of the same property which, if literally construed, are inconsistent with one another. In such cases, the court always endeavours to reconcile the dispositions, and will, if it be possible, so construe them that neither has to be rejected altogether. An early example of this principle of construction is to be found in *Wallop v. Darby* (5), where a testator had purported to devise the same land to his son in tail and to his nephew in fee. It was held that the nephew took an estate in fee simple in the land in remainder expectant upon the determination of the son's estate in tail.

My Lords, it is, I conceive, this principle of construction that lies at the root of what is commonly referred to as the rule in *Lassence v. Tierney* (1). In that case, the rule was stated by LORD COTTENHAM, L.C., in these words, at p. 561 :

If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee—upon failure of such objects, the absolute gift prevails. . . .

This, however, is to state the rule far too narrowly. The restriction upon the legatee's enjoyment is inconsistent with the gift of the legacy in absolute terms, and the restriction will, therefore, be treated, in accordance with the principle to which I have referred, as only affecting the absolute gift so far as is necessary to give effect to the restriction. It is immaterial, however, whether the restriction be imposed by the testator for the benefit of the legatee or for the benefit of third parties. The restriction is inconsistent with the absolute gift in both cases. In the latter case, indeed, the inconsistency is perhaps the more glaring of the two. However, that can be no reason for excluding it from the rule, which is only invoked for the purpose of reconciling inconsistent provisions. The rule, moreover, has been applied over and over again in cases where the subsequent restrictions were not imposed merely for the benefit of the legatee. *Hancock v. Watson* (3) was one of those cases, and the rule as there stated by LORD DAVEY contains no such qualification as that mentioned by LORD COTTENHAM, L.C. What LORD DAVEY said was this, at p. 22 :

. . . it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be.

In other words, the court endeavours to reconcile the two inconsistent depositions made by the absolute gift on the one hand and by the trust on the other hand, and it does so by imputing to the testator the intention to modify the absolute gift only so far as is necessary to give effect to the trusts, whatever those trusts may be.

My Lords, I should not have ventured to trouble your Lordships A with these observations were it not for the fact that I seem to find in the opinions of the judges of the Court of Session in the present case indications of an inclination to introduce into the rule some such qualification as is found in the statement of LORD COTTENHAM. The Lord President said that the destination-over after the death of a daughter B of the testator was adverse to the contention of the present appellants that the fee was vested in her. LORD FLEMING, alluding to the fact that there was a destination-over beyond the issue of the life reatrix, said :

It may be that such a destination-over is not entirely incompatible with the application of the principle, but I do not think it is doubtful that its presence militates C against the view that an initial gift was intended.

My Lords, it is true that, if the words of the will which are said to confer the absolute interest on the legatee are ambiguous, you may, as LORD DAVEY said in *Hancock v. Watson* (3), seek assistance in construing them from the other parts of the will, including the engrafted trusts. D It is also true that, in order to see if an absolute interest has been conferred, you must read the will as a whole. However, the fact that the engrafted trusts are more than usually inconsistent with the idea that an absolute interest has been given to the legatee is not a reason for denying that such an interest has been conferred. To treat the destination-over beyond E the issue of the life reatrix that occurs in the present case as militating against the view that an initial gift in fee was intended is in effect to ignore the rule in *Lassence v. Tierney* (1) altogether, and to apply the principle that in a will the later of two inconsistent provisions is to prevail over the earlier. That is a principle to which the court never F resorts except where it is impossible to reconcile the two provisions by the application of the rule in *Lassence v. Tierney* (1) or otherwise.

My Lords, that there is in the present case an absolute gift to the daughters of the testator upon which trusts have been engrafted cannot, in my opinion, be doubted. It is plain that, if the thirteenth and G sixteenth purposes be considered without reference to the other provisions of the will, each child of the testator other than Ronald took an absolute indefeasible interest in one-fourth of the testator's residuary estate upon attaining the age of 21 years or in the case of a daughter upon her marrying under that age. The other provisions of the will, H however, might have indicated that the division directed by the thirteenth purpose was merely an arithmetical division of the residuary estate into four equal portions and that the persons to take those portions beneficially were not indicated in the purpose. So far, however, from that being the case, the fourteenth, fifteenth and sixteenth purposes strongly

- confirm the construction which the thirteenth purpose would bear if it stood alone. In the fourteenth purpose, a son is treated as having a share in the residue, and he could only have become entitled to it by virtue of the thirteenth purpose. The trustees are given the option either of paying over to a son on his attaining majority or of retaining
- A until he should attain the age of 24 years, not "one of the said fourth shares," but "his" share. So, too, in the fifteenth purpose the trusts are engrafted, not upon the remaining one-fourth shares of the residuary estate, but upon the share to which a daughter "shall become entitled under these presents," which must mean the share to which she shall
- B become entitled under the thirteenth purpose. The sixteenth purpose also refers to the children's "shares" of residue. Nor, in my opinion, can it be doubted, in view of the construction put upon the will in 1928 by the Court of Session, that the trusts engrafted upon the share of the testator's daughter Flora came to an end upon her death, for, according
- C to that construction, which all parties before your Lordships agreed to treat as being the right one, the trust of Flora's one-fourth share, in the event of her death unmarried, was a trust in favour of such other of the residuary legatees as should survive her. None of them did survive her, and the trust accordingly failed to take effect. I agree entirely
- D with the Court of Session in the present case that it is quite impossible to treat this last-mentioned trust as one for the daughter Flora herself. My Lords, for those reasons, as well as for the reasons given in the opinion of my noble and learned friend LORD RUSSELL OF KILLOWEN, I agree that this appeal should be allowed, and that an order should be made
- E such as he has indicated.

LORD MACMILLAN and LORD WRIGHT concurred.

Appeal allowed.

- Solicitors: *Claremont, Haynes & Co.*, agents for *Beveridge, Sutherland & Smith*, Leith, and *Montgomerie, Flemings, Fyfe, Maclean & Co.*, Glasgow (for the appellants); *John Kennedy & Co.*, agents for *A. & A. S. Gordon*, Edinburgh (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

- G R. v. CAMBERWELL BOROUGH ASSESSMENT COMMITTEE.
Ex parte METROPOLITAN HOUSING CORPORATION, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Macnaghten and Singleton, JJ.), **March 31, 1939.**]

- H *Rates and Rating—In the Metropolis—Supplemental list—Alteration in value of hereditament—Dwelling-house let to one tenant changed into tenement house let to two tenants—Increased rent—Whether "from any cause increased in value"—Valuation (Metropolis) Act, 1869 (c. 67), s. 47.*

The applicants were the owners of a dwelling-house which was let to a weekly tenant at a rent of £1 8s., inclusive of rates, and the tenant sublet part of it. Later, the tenant ceased to be in rateable occupation

of the whole of the dwelling-house, and it was let by the owners to two separate tenants at rents amounting in the aggregate to £1 13s. per week. The local authority thereupon made and sent to the assessment committee a provisional list wherein the gross value and net annual and rateable values were shown as having increased from £41 and £29 to £47 and £34 respectively, and the dwelling-house was described as a tenement house. Objection was taken by the applicants to the provisional list upon the ground that no "cause," within the meaning of sect. 47 of the Act of 1869, existed to justify such an entry in the list :—

HELD : as there was a change from an ordinary dwelling-house to a tenement house, which involved not only a change of value but also a change of classification, the rating authority and the assessment committee were entitled to conclude that there was an increase in value from some cause within the meaning of sect. 47.

[EDITORIAL NOTE.] The specific mention in the earlier part of the section here in question of an addition to, or erection upon, the rated premises naturally leads to the suggestion that there must be some physical alteration in the premises, but, for the purposes of placing the question before the assessment committee, any matter which causes an increase in value is sufficient to make a case for their consideration. At the same time, the local authority have to show the nature and cause of the increase in value, and, unless a definable cause for the increase in value is shown, no alteration can be made in the assessment. The change from a dwelling-house occupied as a whole to a tenement house is such a cause.

AS TO ALTERATIONS INCLUDED IN SUPPLEMENTAL LIST, see HALSBURY, *Hailsham Edn.*, Vol. 27, pp. 549, 550, paras. 1007-1009; and FOR CASES, see DIGEST Vol. 38, pp. 640, 641, Nos. 1574-1588.]

Case referred to :

- (1) *Camberwell Assessment Committee v. Ellis*, [1900] A.C. 510; 38 Digest 642, 1601; 69 L.J.Q.B. 828; 83 L.T. 201.

RULES *nisi* for a writ of *certiorari* to be issued to the assessment committee of the metropolitan borough of Camberwell and the rating authority thereof for the purpose of removing and quashing a certain provisional rating valuation list. The facts are fully set out in the judgments.

R. M. Montgomery, K.C., and *Hubert Hull* showed cause.

Michael E. Rowe in support of the rule.

LORD HEWART, L.C.J. : This is a rule *nisi* for a writ of *certiorari* to be issued to the assessment committee of the metropolitan borough of Camberwell and the rating authority for that metropolitan borough, in order to remove into this court a certain provisional rating valuation list made in that borough in Sept., 1938, upon the ground that no cause, within the meaning of the Valuation (Metropolis) Act, 1869, s. 47, existed justifying the entry of No. 23, Oakley Place, in that borough in the list. I am satisfied that the argument which has been put before us by Mr. Montgomery is right, and that this rule ought to be discharged. The provisions of the Valuation (Metropolis) Act, 1869, s. 47, are :

If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect. . . .

The whole question here is whether or not it was true to say, in the

circumstances disclosed by the materials before us, that here the value of the hereditament referred to was, from any cause, increased. The meaning of those words was considered, for example, in *Camberwell Assessment Committee v. Ellis* (1), where LORD DAVEY said, at p. 523 :

- A . . . I agree with the learned judges in the Queen's Bench Division that those words cannot be confined to structural alteration or addition or anything of that kind, but I think that the words "from any cause" are to be read as *ejusdem generis* in this sense, that it must be a cause which affects the value of the particular property. The point is very well put in the judgment of VAUGHAN WILLIAMS, L.J., that it lies upon those who desire to alter the assessment to prove the nature and cause of the alteration in value. It is not sufficient to say that there has been an alteration in value, but you must also point to some definable cause to which that alteration is due, and that cause must be one which affects the assessable value of the particular property. It may affect the assessable value of other properties as well, but it must in my opinion be a cause which directly affects the assessable value of the particular hereditament in question.
- B

Here the following facts appear from the very careful affidavit of Mr. Darrell Musker, who is the town clerk of Camberwell, and clerk of the assessment committee :

C

- . . . in or about the month of Sept., 1938, one Ernest Patrick Phillips, a rate collector in the service of the council, reported to the council (as part of his duties as such rate collector) that the said Edward Hillard had ceased to be in rateable occupation of the whole of No. 23, Oakley Place, and that the said dwelling-house [the dwelling-house with which this case is concerned] was wholly let out by the owners thereof to two separate tenants paying rent direct to a non-resident landlord, and that the rents payable by the said tenants amounted in the aggregate to £1 13s. per week. On Oct. 4, 1938, the council made and sent to the assessment committee a provisional list containing *inter alia* the said dwelling-house, wherein the owners thereof were shown as being the Metropolitan Housing Corporation, Ltd., the dwelling-house was described as a "tenement house" and the gross value and net annual and rateable values were shown as having increased from £41 and £29 to £47 and £34 respectively.
- D
- E

Then Mr. Musker makes the following observations :

- . . . by reason of the fact that the said house was let out in separate tenements the provisions of the Rating and Valuation Act, 1928, Sched. I, referred to in para. 9 hereof have ceased to be applicable thereto, and the council accordingly in due observance of the provisions of the third schedule of the Valuation (Metropolis) Act, 1869, in calculating the net annual and rateable value thereof determined the rate of deduction from the gross value thereof in the manner prescribed by that schedule.
- F

In other words, it was made clear that there had been a change from an ordinary dwelling-house to a tenement house, and that that change had involved, not only a change of value, but also a change of classification.

- G In my opinion, those were materials upon which the authorities were entitled to conclude, as they did, that there was, within the meaning of this section, an increase in value from some cause, within the meaning of sect. 47 of the Act of 1869. I think, therefore, that these rules ought to be discharged.

H
MACNAGHTEN, J. : I agree.

SINGLETON, J. : I agree. The Valuation (Metropolis) Act, 1869, s. 47, has often been considered in the courts. LORD HEWART, L.C.J., has read a portion of the opinion of LORD DAVEY in *Camberwell Assessment Committee v. Ellis* (1), at p. 523. The wording of the section itself in its

commencement appears to me to make it easy to decide this particular case. The section provides as follows :

If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect. . . .

This particular hereditament, according to para. 7 of the affidavit of Mr. A Musker, had been let as a whole on a weekly tenancy at a rent of £1 8s., inclusive of rates, and a part of it had been sublet by the occupier. That was shown by the return made by Mr. Hillard, who was the occupier until the change took place in or about Sept., 1938, and, according to para. 11 of Mr. Musker's affidavit, in Sept., 1938, it was discovered that B the former occupier, Hillard :

. . . had ceased to be in rateable occupation of the whole of No. 23, Oakley Place, and that the said dwelling-house was wholly let out by the owners thereof to two separate tenants paying rent direct to a non-resident landlord, and that the rents payable by the said tenants amounted in the aggregate to £1 13s. per week.

I am satisfied that there had been a change from a house to a tenement C house, and that that might be a cause, as indeed Mr. Rowe was inclined to admit, but whether or not it led to an alteration in the value was a question for those who had to consider the matter. I am satisfied that it was a cause, and that that cause led to an alteration, in this case, an D increase in value. The council, as rating authority, and the assessment committee, in my view, acted rightly. I agree that these rules ought to be discharged with costs.

Rules discharged with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Darrell Musker*, Town E Clerk, Camberwell (showing cause) ; *Blundell, Baker & Co.* (in support of the rule).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

CHANT v. READ.

[KING'S BENCH DIVISION (Hallett, J.), March 30, April 3, 1939.]

Husband and Wife—Legal proceedings—Right of wife to sue husband in tort— G
Protection or security of property—Loss of expectation of life—Married Women's Property Act, 1882 (c. 75), s. 12—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6.

Negligence—Joint tortfeasors—Contribution—Husband administrator of wife's
estate—Claim by third person against husband for contribution in respect of
liability arising out of wife's death—Loss of expectation of life—Right of
wife to sue husband in tort—Married Women's Property Act, 1882 (c. 75),
s. 12—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1— H
Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6
R.S.C., Ord. 25, rr. 2-4.

The plaintiff in this action was defendant in an action brought by the present defendant, R., in respect of a collision between the plaintiff's motor bicycle and R.'s motor car. The wife of R. having been killed in the collision, R., as administrator of his wife's estate, sued the plaintiff for damages arising out of the loss of expectation of life of R.'s wife.

Thereupon the plaintiff, by the present action, claimed contribution from R. under the Law Reform (Married Women and Tortfeasors) Act, 1935, alleging that R. was liable to pay contribution as a joint tortfeasor in respect of the loss of expectation of life of R.'s wife. The right to contribution was dependent upon the question whether the wife had a right to sue her husband for loss of expectation of life—that is, whether the expectation of life was “property” within the meaning of that word in the Married Women's Property Act, 1882, s. 12 (as amended), and this point was argued as a preliminary point of law :—

HELD : (i) the loss of expectation of life was not “property” within the meaning of that word in the Married Women's Property Act, 1882, s. 12, and no action would lie by a wife against her husband to recover damages for such loss.

(ii) the claim of the administrator must, therefore, fail, and no claim to contribution could arise.

(iii) the proper course was to make an order under R.S.C., Ord. 25, r. 4, that those parts of the pleadings dealing with the claim to contribution be struck out.

[EDITORIAL NOTE.] The law defining the right of a wife to sue her husband has been largely amended, but there still remains the disability of either wife or husband during the coverture to sue the other for a tort, except for the protection and security of the wife's property. The point which arises here is whether the loss of expectation of life, which recent accident cases have made so familiar, is a loss of “property” within the meaning of this provision—that is, within the Married Women's Property Act, 1882, s. 12, as amended in 1935. The decision is, in short, that such loss is not loss of “property.” Indeed, it is not a separate cause of action, but merely a head of damage to be considered in assessing the general damages for negligence causing personal injuries. It cannot be doubted that this is fully in accordance with the opinions of their Lordships in *Rose v. Ford* (6).

As to RIGHT OF WIFE TO SUE HUSBAND IN TORT, see HALSBURY, *Hailsham Edn.*, Vol. 16, pp. 739, 740, paras. 1209, 1210; and FOR CASES, see DIGEST, Vol. 27, pp. 258-260, Nos. 2278-2295.]

Cases referred to :

- (1) *Barber v. Pigden*, [1937] 1 K.B. 664; [1937] 1 All E.R. 115; Digest Supp.; 106 L.J.K.B. 858; 156 L.T. 245.
- (2) *Gottliffe v. Edelston*, [1930] 2 K.B. 378; Digest Supp.; 99 L.J.K.B. 547; 143 L.T. 595.
- (3) *Fender v. Mildmay*, [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340.
- (4) *Ralston v. Ralston*, [1930] 2 K.B. 238; Digest Supp.; 99 L.J.K.B. 266; 142 L.T. 487.
- (5) *Tinkley v. Tinkley* (1909), 25 T.L.R. 264; 27 Digest 260, 2294.
- (6) *Rose v. Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174.
- (7) *Flint v. Lovell*, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231.

ACTION by the plaintiff for contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, against the husband of a woman killed in an accident caused by the alleged negligence of the plaintiff and the husband of the deceased. This was a preliminary point of law under R.S.C., Ord. 25, r. 2.

James A. Petrie for the plaintiff.

Felix Denny for the defendant.

Petrie : A wife is entitled to sue her husband where this is necessary for the protection of her own property. The right to enjoy life for the full normal period is a thing of value, and, as such, can be described as "property." Consequently, a right to sue vested in the wife at the time of her death, and it follows that this right can be exercised as against the husband, the defendant, by bringing a claim for contribution. A

Denny : There are three propositions of law. The first two are not disputed. (i) The right of the plaintiff to claim contribution is based on the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, which provides that joint tortfeasors are entitled to claim contribution from each other. (ii) All causes of action, except a number of causes immaterial in the present case, survive for the benefit of the estate of a deceased person. (iii) Only actions for the protection of a wife's own property can be brought against a husband. The normal expectation of life is not "property." Therefore, at the time of her death, the wife had no right of action capable of surviving. The plaintiff's claim to contribution must fail. B C

HALLETT, J. : The point of law which is raised in this case arises in the following way. On June 17, 1938, a collision occurred between a motor cycle ridden by Leonard Chant and a car driven by Arthur John Read. For reasons which will subsequently appear, I think that it will be best if I refer to those two parties by their names, Chant and Read, rather than by the description "plaintiff" and "defendant." Arising out of that collision, on Oct. 25, 1938, Read began an action in this Division of the High Court against Chant, and in his statement of claim, delivered on Nov. 9, 1938, he made certain claims. On Dec. 9, 1938, Chant commenced an action against Read, and in due course, on Dec. 22, 1938, he delivered his statement of claim. Thus, for some reason which I am not sure I entirely appreciate, and about which I have been told nothing, there have come into existence these two cross-actions—first of all, to take them in chronological order, Read against Chant, and, secondly, Chant against Read. In so far as Read claims against Chant in respect of Read's own damages, and in so far as, in the second action—the one with which I am now directly concerned—Chant claims against Read in respect of Chant's own damages, no point arises, so far as I am concerned, in connection with this argument. I have not before me the pleadings in the first action, but in the second action para. 1 of the statement of claim deals solely with Chant's personal claim against Read for the damage which Chant says that he has sustained as regards personal injuries and special damage. E F G H

The way in which the present point arises is this. In Read's car at the time of the accident his wife, Mrs. Read, was a passenger, and unfortunately as a result of the accident Mrs. Read was killed. In those circumstances, Mrs. Read having been killed, her administrator has joined in the action of Read against Chant to claim damages in respect

- of Mrs. Read's death for the benefit of Mrs. Read's estate, pursuant to the right to claim such damages which has arisen by reason of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1). It so happens that the administrator of Mrs. Read's estate is her husband, Read, who is also a plaintiff in that action in his personal capacity, but counsel are
- A agreed that the natural fact that the administrator of Mrs. Read is her husband is quite irrelevant, and that the points which I have to consider would be just the same if it had so happened that the administrator of Mrs. Read's estate had been some person wholly unconnected with her.
- B Mrs. Read's administrator having then made a claim against Chant in the first action, in the second action, by paras. 2, 3, 4 and 5 of his statement of claim, Chant alleges that, if he is liable to pay damages to the estate of Mrs. Read in respect of her loss of expectation of life, he is entitled to claim contribution from Read, Mrs. Read's husband by
- C virtue of certain provisions, to which I shall next have to refer. It is upon that claim that the point of law which I now have to decide arises. It is the claim, as I have said, made in paras. 2, 3, 4 and 5 of the statement of claim, and under those paragraphs Chant in the second action claims contribution from Read. Read, by his defence delivered on
- D Jan. 21, 1939, and by para. 5 thereof, admits the allegations of fact contained in paras. 3 and 4 of the statement—para. 2 being merely an introductory paragraph—but denies that he would be liable as alleged in para. 5 of the statement of claim, and concludes his paragraph of the defence by submitting that paras. 2, 3, 4 and 5 of the statement of
- E claim disclose no cause of action. The question which I have to decide is whether or not that submission is correct in point of law. The matter is undoubtedly one of some little difficulty, and it may well be that it will turn out to be a matter of some general importance. It is fortunate, therefore, that I have received all possible assistance from counsel on
- F each side in coming to my decision about it.

Mr. Denny, for the defendant, who opened the argument, submitted to me three propositions, as to two of which there is no dispute. In the first place, he pointed out that Chant's right to recover compensation depends upon the Law Reform (Married Women and Tortfeasors) Act,

G 1935, s. 6 (1), the material parts of which are as follow :

Where damage is suffered by any person as a result of a tort (whether a crime or not) . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage . . .

- H Therefore, says Mr. Denny, for the defendant, unless Mr. Read is a tortfeasor who is, or who would, if sued, have been, liable in respect of the same damage—namely, the causing of the death of Mrs. Read by reason of this collision—the right to contribution fails to be established at the very inception. So far as that proposition, which I understand to be Mr. Denny's first proposition, is concerned, it has not been contro-

verted by Mr. Petrie, who has argued this matter so strenuously on behalf of Mr. Chant. Secondly, says Mr. Denny, in order that the husband Read may be liable in respect of the same damage, it must be shown that the cause of action, whatever it was, was a cause of action which continued notwithstanding the death of Mrs. Read, and he says that, if that result is to be attained, it must be attained under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1). The material parts of that provision are as follow :

Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

There are other provisions in that section, but I do not think that for present purposes I need refer to them.

Now, says Mr. Denny, therefore, in order to entitle Mr. Chant to contribution against Mr. Read, it must be shown that, by virtue of this provision in the Act of 1934, there was a cause of action vested in Mrs. Read which, by virtue of the provision, survives for the benefit of her estate. Thus, he says, we come to the point that the inquiry must be directed to finding out whether or not, at the time of Mrs. Read's death, there was a cause of action vested in her. If there was a cause of action vested in her, then, not being one of the excepted causes of action, it will survive by virtue of the 1934 Act, and, having survived by virtue of the 1934 Act—I am, of course, assuming all along that there is a cause of action against Mr. Read—then, by virtue of the 1935 Act, Mr. Chant's claim for contribution may succeed, but not otherwise. That proposition, again, has not been controverted by Mr. Petrie.

We now come to Mr. Denny's third proposition, and it is on this proposition that the whole of the argument has turned. Mr. Denny says that it is incorrect to say that at the moment of Mrs. Read's death there was vested in her any cause of action against her husband, Mr. Read, in respect of her loss of her normal expectation of life, and his reason for that submission is that, according to his argument, such a cause of action was prevented from so vesting by reason of the provisions of the Married Women's Property Act, 1882, s. 12. It has not been of very great assistance to me in my task to discover, as was pointed out to me by counsel, that I have to alter sect. 12 in certain respects in order to give effect to the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, which effects alterations in sect. 12 of the Act of 1882. By way of making it still more difficult for me, I have to look for those alterations in two separate schedules in the 1935 Act. Looking at the first schedule of the Act, I find that in sect. 12 for the words "such property belonged to her as" there shall be substituted the words "she were." If one is of a frivolous turn of mind, one cannot help speculating how far, when the legislature passed that, they knew exactly what the effect of their operations would be. Then in the second schedule one finds that certain repeals have been made, and one of the repeals is the word

"separate" in the Married Women's Property Act, 1882, s. 12. Mr. Petrie, who has been so accurate in every other respect, was led into telling me that the word "own" also appeared there, but I think that he was wrong. The result of those two things in the schedules to the 1935 Act is that that section, so far as material, of the 1882 Act must

A now be read as follows :

Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso herein-after contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own property, as if she were a *feme sole*, but, except as afore-said, no husband or wife shall be entitled to sue the other for a tort.

B It is plain that the cause of action against Mr. Read, if any, which was vested in Mrs. Read at the moment of her death was a cause of action in tort, and it has not been suggested to me that it was anything else. Therefore, when one has regard to those words "no husband or wife shall be entitled to sue the other for a tort," it is necessary, says Mr. Denny —and I think that this is conceded—for Mr. Chant to show that the cause of action which, apart from this section, would have been vested in Mrs. Read, at the time of her death, as against Mr. Read constituted a civil remedy for the protection and security of her property as if she were

C a *feme sole*. The most material words of all, in my opinion, are the words "civil remedies . . . for the protection and security of her own property."

D

There is one further provision in the 1882 Act to which I must call attention, and that is the fact that in sect. 24, the definition section, it is provided as follows :

E

The word "property" in this Act includes a thing in action.

There are two matters relied upon by Mr. Petrie, who has pointed out to me that in the Trustee Act, 1925, s. 68 (11), there is the following definition :

F "Property" includes real and personal property, and any estate share and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not.

He pointed out to me, of course, very rightly, that the introductory part of sect. 68 is as follows :

G In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say . . .

Nevertheless, he invites me to look at that definition in the Trustee Act as throwing light upon the meaning which ought to be given to the word "property" in the Act of 1882 when construed by a judge sitting in

H 1939. I must confess that I think that such a process of construction is fraught with very grave dangers, and, whilst it is a common practice, and sometimes a useful practice, to refer to definitions in one Act for the purpose of inducing the court to adopt a certain construction of the words defined for the purposes of another Act, I think that it is a process which one has to undertake with a good deal of caution.

The other point which I think it only fair to Mr. Petrie to mention is this. Mr. Petrie has drawn my attention to *Barber v. Pigden* (1). The actual point in that case was very different indeed from any point which I have to consider here. It was a case in which the main point raised was whether the Law Reform (Married Women and Tortfeasors) Act, 1935, had a retrospective operation, so as to exonerate the male defendant from liability for his wife's torts, the tort in question being the publication by the wife of a slander on different dates. The reason why Mr. Petrie desired me to pay attention to that case was that, in the course of his judgment, SCOTT, L.J., who was one of the three members of the Court of Appeal, said, at pp. 677, 678 ([1937] 1 All E.R. at p. 125):

The language of Part I [of the Act of 1935] discloses an intention to make a clean sweep of the old legal fiction of our common law that a woman on marrying became merged in the personality of her husband, and ceased to be a fully qualified and separate human person.

Then he says something with regard to the draftsmanship of the Act, and he continues as follows, at p. 678 ([1937] 1 All E.R. at p. 125):

But as far as the present case is concerned, the dominant intention of the Act is clear beyond all doubt: it is to effect a drastic reform of our law in a branch where there has been too much legal fiction and too much technicality of legal procedure; and I do not think the rule against retrospective interpretation, on which Mr. Slade relies, is properly applicable to such a statute abolishing legal fictions any more than to a merely procedural statute. The purpose of Part I of the Act is to give back to a woman, though married, the full human status allowed by the common law to a man, a maiden or a widow, of which the common law had robbed her; in short, it restores to her her natural status and capacity. It does it by sweeping away a host of legal fictions—fictions which in origin were inextricably mixed up with old procedural law:

Then he goes on to deal more particularly with the matter which had there to be considered. Mr. Petrie, very naturally, says that there is there a plain guidance from SCOTT, L.J., as to the spirit in which this sort of problem ought to be approached to-day, and Mr. Petrie has invited me, in so many words, to look at the matter broadly and deal with it courageously. The first observation I have to make about that is this. If one looks at the very section of the 1935 Act with which SCOTT, L.J., was concerned—namely, sect. 1—what does one find? Let me read the material parts:

Subject to the provisions of this Part of this Act, and subject, as respects actions in tort between husband and wife, to the provisions of the Married Women's Property Act, 1882, s. 12, a married woman shall . . . in all respects as if she were a *feme sole*.

In the particular case with which he was dealing, SCOTT, L.J., points out that the general purpose of that section and of the following sections—that is to say, the sections in Part I of the Act of 1935—is to put a woman back in what he regards as her natural, as distinct from her legal (though artificial), position. However, there is nothing which I have observed in his judgment, nor should I expect anything, which lays it down, or even hints, that other courts would be right to ignore, or to whittle down in any way, the express exception which the legislature

thought right to retain, when in other respects altering the position of women, by making the exception imported in the following words :

... subject, as respects actions in tort between husband and wife, to the provisions of the Married Women's Property Act, 1882, s. 12.

A It may be that an enlightened opinion would take the view that that exception ought never to have been retained, but, where there is an exception in the plainest possible terms put into a section of an Act of Parliament, and presumably put in there because it was meant to be there, it certainly would be wholly wrong for me to ignore that express exception, and I can find nothing in the words of SCOTT, L.J., which would
B in any way authorise or invite me to adopt that course.

Therefore, I have to come back once more to those provisions of sect. 12 of the 1882 Act which Parliament, by sect. 1 (1) of the 1935 Act, has thus expressly saved, and I have to ask myself the question which I have already indicated—namely, when Mrs. Read died, had she
C a civil remedy for the protection and security of her own property in the shape of a right of action for damages for the shortening of her normal expectation of life? Looking at those words by themselves, I should have thought not, and, even taking into account the definition in sect. 24, I should still have thought not. I should have thought that the nature
D of the civil remedy which she had was not accurately described by calling it a remedy for the protection and security of her own property. Undoubtedly, however, Mr. Petrie has pointed out to me that the matter cannot properly be disposed of in quite such a summary way, and he has convinced me that it is a matter where, if I can derive any assistance
E from the perusal of authority, I ought to be ready and anxious to avail myself of that assistance. For that purpose, my attention has been drawn by both counsel to a decision of McCARDIE, J., in *Gottliffe v. Edelston* (2). In that case, the headnote is as follows :

F An unmarried woman sustained injuries through a man's negligent driving, and issued a writ against him claiming damages in respect thereof. Before the trial of the action she married him.

Of course, that is a case where the facts, as I have made plain from reading those few words, were of a special character, because, at the time that the woman issued her writ, she was not in any way precluded
G from so doing by the provisions of the Married Women's Property Act, 1882, s. 12, and the question was whether or not the fact that she had married the man before the trial brought into operation against her the provisions of sect. 12. Having read the case now with some care, and having had the assistance of observations on it from both counsel, I
H think that, if that case had been decided in favour of the plaintiff by McCARDIE, J., there would still at any rate have been scope for argument that the decision did not apply in a case where the plaintiff had been married to the defendant throughout. I express no opinion as to whether or not it would have applied. At any rate, I can see that there might have been considerable argument upon the subject. In fact, however,

McCARDIE, J., held that the right of action which was *prima facie* acquired by the plaintiff in respect of the injuries sustained through the defendant's negligent driving was not a civil remedy for the protection and security of her own property so as to enable her to rely upon that right of action notwithstanding the provisions of the Married Women's Property Act, 1882, s. 12. I have read the judgment of the judge with care, and, in so far as the judge has thought it right to express views on the nature of social relationship which should exist, from the point of view of law, between husband and wife, I prefer to say nothing. I recognise that it is sometimes necessary for the courts to form and express a view upon questions of public policy. I have in mind, for instance, *Fender v. Mildmay* (3), where it was essential for the courts to form a view upon a question of public policy. I think that it has been generally recognised, however, and I myself feel very strongly, that that is a course which is fraught with dangers and difficulties. Indeed, the difference of opinion which manifested itself between various judges in *Fender v. Mildmay* (3) is perhaps an illustration of what I have in mind, and, for my own part, so long as I can properly content myself with interpreting the law as I conceive it to be, and am not driven by my duty to express any opinion on what the law ought to be, I shall feel that I am on very much safer ground. None the less, having read the judgment of the judge, and having considered the authorities to which he refers, I independently come to the conclusion that his decision was perfectly right. I think that it affords authority, and that within the judgment there can be found reasons, apart from questions of public policy, for the necessity of coming to the conclusion that a right of action in respect of personal injuries caused by negligence cannot properly be regarded as a civil remedy for the protection and security of the property of the person who is so injured.

I ought perhaps to refer to two other cases which have been mentioned to me. One of them is *Ralston v. Ralston* (4), where MACNAGHTEN, J., decided, according to the headnote, that, although a certain inscription

... was capable of a defamatory meaning, the plaintiff, by reason of the Married Women's Property Act, 1882, s. 12, could not sue her husband on it, the action being for a tort and not for the protection and security of her separate property.

The decision, of course, sufficiently appears from that part of the headnote which I have just read. It is not, of course, completely in point, because the action was different, but I find support in the judgment of MACNAGHTEN, J., for the view which has been expressed by McCARDIE, J., in *Gottliffe v. Edelston* (2) and which, as I have already said, I share. I find, I think, further support for that view in *Tinkley v. Tinkley* (5), which was decided by the Court of Appeal.

That being the position, it became necessary for Mr. Petrie to convince me, if possible, that the cause of action here vested in Mrs. Read at the time of her death—namely, the cause of action for the loss of the normal expectation of life—was distinguishable from the cause of action which

would have been vested in her if she had merely sustained personal injuries but such personal injuries had not resulted—at any rate, up to the time of action brought—in her losing her life. In support of that distinction, he has drawn my attention very carefully to various passages in the opinions of their Lordships in *Rose v. Ford* (6). He has also drawn
A my attention, I think at my request, to *Flint v. Lovell* (7), a slightly earlier case in the Court of Appeal, which was expressly approved by their Lordships in *Rose v. Ford* (6). The particular passages upon which Mr. Petrie has relied in *Rose v. Ford* (6) are several in number, but I do not think that I need refer in this judgment to all of them. I will take,
B if I can, one which fairly represents the rest. I think I may take a passage from the opinion of LORD WRIGHT as a fair example of the passages upon which Mr. Petrie relies. LORD WRIGHT says, at p. 845 ([1937] 3 All E.R. at p. 370) :

The moment before the girl died there was, as I think, apart from her actual
C death a cause of action vested in her for deprivation or loss of expectation of life. Before the Act, that cause of action would have ceased with her death. That same cause of action, by force of the Act, now survives in the administrator.

Therefore, says Mr. Petrie, on the strength of that and some other similar passages, it should be regarded that there is a separate cause of action
D for deprivation or loss of expectation of life. Elsewhere in the opinions, Mr. Petrie says, are to be found some more expressions of the nature of the right which is vested in the deceased at the moment of her death. For instance, LORD WRIGHT says, at p. 848 ([1937] 3 All E.R. at p. 371) :

A man has a legal right that his life should not be shortened by the tortious act
E of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given.

Relying on those and certain other passages in the opinions, Mr. Petrie contends that, whatever may be the case as regards the right to claim damages for personal injuries which do not result in the shortening or
F the abolition of the normal expectancy of life, the right to enjoy life for the full normal period is a thing of value, that a thing of value can rightly be described as property, and that, therefore, the right to claim damages for the impairment or abolition of that thing of value is a civil remedy for the protection and security of that piece of property—namely,
G the right to have life continue in the normal way. I have two observations to make about that extremely ingenious and interesting argument. The first observation is this. In *Rose v. Ford* (6) their Lordships expressly approve of *Flint v. Lovell* (7), and the substance of the decision in *Rose v. Ford* (6) was that the principle laid down in *Flint v. Lovell* (7)
H is not confined to the case where the injured person is alive at the date of action. It is true that in *Rose v. Ford* (6) an argument was rejected which contended that the damages which could be recovered for the loss of expectation of life under *Flint v. Lovell* (7) were merely part of the damages for pain and suffering, and that, therefore, where the loss of the expectation of life did not involve pain and suffering—any extra

pain and suffering, as, for instance, where death was practically instantaneous—no such damages for loss of expectation of life could be recovered. That argument was undoubtedly rejected in *Rose v. Ford* (6), but, if one goes back to what *Flint v. Lovell* (7) beyond all question did decide, one finds that it decided, according to the headnote, which I think correctly reproduces the effect of the judgments :

HELD (by GREER and SLESSER, L.JJ., ROCHE, L.J., *dubitante*), that in assessing the damages the judge was entitled to take into consideration as one of the elements of damage the fact that the plaintiff's normal expectation of life had been materially shortened.

When I come to the opinions in *Rose v. Ford* (6), I find nothing which suggests to me that their Lordships would in any way have disapproved of that way of putting the matter. On the contrary, I think that their Lordships also took the view that what was being awarded was a head of damages, a head of damages in respect of the loss of the normal expectancy of life, which was undoubtedly a head to be considered separately from the heads of damages which might arise in respect of pain and suffering, the loss of a limb, and other matters. For instance, LORD WRIGHT said, at p. 848 ([1937] 3 All E.R. at p. 372) :

I do not think it can be said that the idea of taking this element of damage into calculation is novel.

He then went on to give reasons for saying that. Again he said, at p. 849 ([1937] 3 All E.R. at p. 373) :

I think both on principle and on authority this element of damage, that is, for the shortening of life or for the loss of the normal expectancy of life, was properly taken into calculation in *Flint v. Lovell* (7), and should be considered here, as GREER, L.J., thought.

Other passages to the same effect are to be found in the opinions in *Rose v. Ford* (6).

Whether it is better to describe this particular remedy which we are discussing in this case as a cause of action for the loss of the normal expectancy of life or to say that the cause of action is the negligence causing personal injury to the deceased and the loss of the normal expectancy of life is regarded merely as one of the consequences—in some cases the most important, or, indeed, the only consequence—of the physical injuries inflicted by reason of the negligence and, therefore, has given rise to a separate and special head of damage, I doubt whether it greatly matters. I observe that in the opinion of LORD ATKIN there is one passage which does recognise a distinction of some importance for present purposes. His Lordship says, at p. 834 ([1937] 3 All E.R. at p. 362) :

It does not seem to me necessary to say that a man has a personal right of the nature of property in his life, so that when it is diminished he loses something in the nature of valuable property. I do not say that this is not so : but I am satisfied that the injured person is damaged by having cut short the period during which he had a normal expectation of enjoying life : and that the loss, *damnum*, is capable of being estimated in terms of money : and that the calculation should be made.

If LORD ATKIN had decided the point envisaged in the first sentence of that passage—that is to say, if he had decided that a man has a personal

right of the nature of property in his life, so that when it is diminished he loses something in the nature of valuable property—undoubtedly it would have been of assistance to Mr. Petrie's argument, and what Mr. Petrie has contended is that some of the rest of their Lordships—I think particularly LORD WRIGHT—did come very near to deciding that,

A if they did not absolutely decide it. However that may be, I cannot see any real or sufficient distinction between the cause of action for inflicting personal injuries which result in affecting the quality of the life which is thereafter enjoyed and the cause of action for negligence causing personal injuries which result in affecting the quantity of the life which

B is thereafter enjoyed. There may be personal injuries as a result of which someone is deprived of his recreations—tennis, golf, walking, dancing, or whatever it may be—and, if that is one of the results of the personal injuries, and the personal injuries are caused by negligence, the tribunal takes that element into account in assessing compensation.

C There may be personal injuries which have a more disastrous and sudden result. They may terminate the enjoyment of life altogether—no more dancing, no more tennis, no more golf—because the victim is dead. There may be the intermediate case where the enjoyment is both impaired in quality and shortened in quantity, as was the case in *Flint v. Lovell* (7),

D where Mr. Flint was alive but was expected to die in a year. Everyone ever since has been pleased to know that he is still living, but, whichever be the result of the personal injuries, I feel it really impossible to say that there is such a distinction in the nature of the remedy that in the one case, as held by McCARDIE, J., and I think rightly, the remedy does

E not subsist for the benefit of a married woman under the exception contained in the Married Women's Property Act, 1882, s. 12, but in the other case it does. I recognise that, upon the basis of certain passages in *Rose v. Ford* (6), Mr. Petrie has been able to construct an extremely interesting argument to convince me that this particular type of com-

F pensation is a civil remedy in respect of property, whereas analogous rights to obtain compensation in respect of the results of personal injuries may not be—though he does not concede it—rights of property of the kind which he requires for the purposes of his argument. I follow all the passages to which he has drawn my attention. I am unable to see

G the distinction. I think that McCARDIE, J., was right in his result, and I think that the same result is applicable when the result of the personal injuries has been the loss of the normal expectation of life.

If that be right, it appears to me to conclude the question which I have to determine. In my judgment, while the Married Women's

H Property Act, 1882, s. 12, remains as it is, upon a true construction of that section—not upon any view of what the law ought to be, but upon my view of what the law is—a married woman who is killed in a motor collision by reason of the negligence of her husband in driving the car in which she is a passenger has not got vested in her at the date of her death a cause of action against her husband for damages for the loss of

her normal expectancy of life. If Mrs. Read had not got vested in her at the date of her death such a cause of action, then it would appear, to recapitulate the matter, that Mr. Read is not, and cannot be, a tortfeasor who is, or would if sued have been, liable in respect of the same damage as that in respect of which Mr. Chant is liable to Mrs. Read's administrator. Therefore, it follows that a claim for contribution based, as this claim is based, upon the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c), must fail. I do not think that there is any real difference between counsel as to what course I should take if that be the opinion at which I have arrived. R.S.C., Ord. 25, r. 3, provides as follows :

If, in the opinion of the court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action . . . the court or judge may thereupon dismiss the action or make such other order therein as may be just.

In my opinion, the decision of this point of law does substantially—and, indeed, totally—dispose of the distinct cause of action alleged in paras. 2, 3, 4 and 5 of the statement of claim, and I ought to make an order which will give effect to that opinion. Rule 4 provides as follows :

The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer . . .

I do not think that it is disputed that probably the most convenient course to adopt would be to order paras. 2, 3, 4 and 5 of the statement of claim in the action of Chant against Read to be struck out as disclosing no reasonable cause of action, and also, I think, para. (b) of the claim at the end of the statement of claim—that is to say, the paragraph making the claim under those paras. 2, 3, 4 and 5. In order to get the pleadings into a condition consistent with that, I think that the defendant had better also have leave to amend the defence by deleting para. 5 of the defence, which is the paragraph raising this point of law. I think that that is the only order which it appears to me to be necessary to make as a result of my decision on this point of law, except that the costs of the argument must, in my judgment, be the defendant's costs in any event.

Those paragraphs of the statement of claim dealing with claim for contribution to be struck out. Defence to be amended accordingly. Costs of this argument on a point of law to be defendant's in any event. Leave to appeal.

Solicitors : Wm. Easton & Sons (for the plaintiff) ; F. J. Stewart (for the defendant).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

R. v. MILLS.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Macnaghten and Singleton, JJ.), **March 27, 1939.**]

Criminal Law—Trial—Direction to jury—Acquiescence by minority in verdict of majority.

A

The direction to the jury must not convey to them the impression that a minority may acquiesce in a verdict with which they do not really agree. A loose acquiescence for the sake of avoiding trouble or inconvenience or costs to the parties is not only indefensible but a violation of the juror's oath.

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[EDITORIAL NOTE.] It is fundamental that the verdict of a jury must be unanimous, and that all the members must conscientiously and sincerely agree in that verdict. The inconvenience to the parties and to the public of a new trial requires that the jury should carefully consider whether there is a real difference of opinion among them, but this does not mean that there may be a loose acquiescence in a majority verdict merely for the purpose of avoiding such inconvenience.

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AS TO DUTY OF JURY, see HALSBURY, Hailsham Edn., Vol. 9, p. 178, para. 258; and FOR CASES, see DIGEST, Vol. 14, pp. 328, 329, Nos. 3438-3444.]

APPEAL from a conviction at the Central Criminal Court on a charge of obtaining a cheque by false pretences. This case is only reported on the consideration of the proper instruction to a jury who find a difficulty in arriving at a unanimous verdict.

D

W. H. Hickin for the appellant.

Maxwell Turner for the Crown.

LORD HEWART, L.C.J. [delivering the judgment of the court]:

E

The appellant was convicted at the Central Criminal Court upon a charge of obtaining a cheque of £354 by false pretences. The appellant was convicted and he was sentenced by the Recorder to 9 months' imprisonment. He now by leave of this court appeals, and appeals on one ground only that the Recorder misdirected the jury "when he instructed the

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jury that it was in keeping with their duty for the minority to accept the decision of the majority, and told the jury that he could not release them until they had reached a verdict." It is important to see what were the very words that the Recorder used. The matter arose in this way.

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The jury retired to consider their verdict at 20 minutes past 11 in the morning and at 11 minutes past 1 they returned into court. The Recorder said: "I understand the message from you is that you have not agreed upon your verdict. Is that so?" The foreman said: "That is so." Then the Recorder said this: "I will say this to you." Then he purported to repeat or paraphrase the words used by a judge not named,

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and those words are now before us in the transcript. It is very important to observe the very words which the Recorder used upon this most grave and crucial matter, and nothing, it need hardly be said, could be more to be deplored than the giving of an impression to a jury that it might be right for them to appear to arrive at an agreement when in fact they had not, or to appear to express a view which they did not honestly and

individually entertain. It goes without saying that nothing could possibly have been further from the mind of the Recorder than to create any impression contrary to that well-recognised principle, but the question is whether the expression he used could unfortunately have conveyed the wrong impression to the jury. It is therefore important to see what the words were which he used when he was purporting to repeat or paraphrase the words used by a judge in another case. The words were as follows :

It is of the utmost importance that a jury should come to a conclusion one way or the other at the end of a trial, because it is burdensome upon all concerned, including the accused, because it only means this that unless you do the matter has got to be tried all over again ; therefore you see the importance and necessity of coming to a conclusion one way or the other.

Then the Recorder went on to say that the learned judge he had referred to had said this :

Where you have got one or two, a small minority, in the jury who are thinking perhaps differently from the others it is quite consistent with their oaths as jurymen that they should, after hearing what the others had got to say, come to the conclusion that they themselves might be wrong, and it would be consistent with the discharge of their duty and with their oaths in those circumstances if they thought they were wrong to accept the view of the majority and come to the conclusion that the majority might be right, and in that way you come to a conclusion in which you all agree by the exchange of view, and perhaps a man in the minority might say : " Well, I may be wrong." That is quite consistent with the discharge of your duty.

A moment or two later, the Recorder added :

I must ask you to reconsider this matter and go back to your room, and, when you come to a conclusion, I will come back into court and take your decision, so that you may be released. I cannot release you until you have come to a conclusion, and therefore I have got to ask you to retire again and consider the matter in the light of what I have said to you.

With regard to those observations made to the jury, two criticisms are made. First of all, it is said that those words : " I cannot release you until you have come to a conclusion " amounted to putting pressure upon the jury to appear to come to a conclusion though they had not in fact done so. Of course, nothing could have been further from the mind of the Recorder than any such opinion or expression as that. It goes without saying that a conclusion that the prisoner was not guilty would have been just as much a conclusion as one that he was guilty. Further, a conclusion that it was impossible for the jury to agree would equally have been a conclusion. That is not the difficulty. The real difficulty is whether those words might have conveyed to the jury that they might appear to have come to a conclusion. What must be regarded is the effect on the minds of the jury of the following words : " where you have got one or two, a small minority, in the jury who are thinking perhaps differently from the others, it is quite consistent with their oaths as jurymen that they should, after hearing what the others have got to say, come to the conclusion that they themselves might be wrong." The conclusion which is required is the conclusion that they were wrong. Then the words go on : " and it would be consistent in those circumstances, if they thought

they were wrong, to accept the view of the majority." This expression would seem to be an unfortunate one, and could only be applicable to a case where the minority had honestly and sincerely come to the conclusion that the majority were right.

- The criticism which is directed against that passage is that it might, A not that it must, have conceivably led members of the jury, or some members of the jury, to coquette with the notion that, for the sake of conformity or convenience, it would be consistent with their oaths to make it appear that they accepted a view which they did not accept. Such a conclusion would be utterly subversive. A member of a jury B must take a view honestly, conscientiously and sincerely, and a loose acquiescence by a majority in the view of the majority for the sake of conformity or convenience is not merely most undesirable but flagrantly wrong. It is fundamental that the jury should agree. When the word "agree" is used, what is meant of course is that they must honestly C agree, not make a colourable appearance of agreeing.

- It is inconceivable that the Recorder for a moment entertained any view different from that view. The danger here is that the use of certain of the expressions to which reference has already been made taken in juxtaposition with the Recorder's final words: "I cannot release you D until you have come to a conclusion" may have conveyed to the minds of the jury that it is not merely desirable but necessary to appear to come to a conclusion, and that the minority should, for the sake of the appearance of unanimity, profess to be reconciled with a view which they do not in fact entertain. It is of the greatest importance, indeed it is fundamental E that a jury should not be led, either by a desire to acquiesce or to avoid eccentricity, or to save time and trouble, to represent themselves as holding an opinion which they do not in fact hold. The jury is required to give a true verdict according to the evidence, not an untrue verdict according to somebody's actual or supposed convenience.

- F There is the clearest possible distinction between the words used in the direction of another judge in another case and those used in the present case. It may be that some of those expressions, though that was not at all the intention of the Recorder, may have conveyed to some members of the jury the impression that they might or even must appear to agree G when in fact they do not agree. If that impression were conveyed nothing could be more unfortunate. Nothing is more primary and fundamental in its character than the duty of each juror to form and express his opinion. A loose, vague acquiescence for the sake of avoiding delay and trouble would be not only indefensible but actually wrong and a violation H of the juror's oath. No words of another judge in any court can fairly be construed as conniving at any acquiescence by the minority in a view of the majority which that minority did not accept.

There is no doubt that what the Recorder here intended to convey was a right and proper view of the duty of a juror, but he used one or two perilous phrases which may conceivably have caused some members

of the jury to incline their minds to a wrong view. In these circumstances, we have come to the conclusion that the only proper course is to allow this appeal and quash the conviction.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ;
Solicitor, Legal Department, Scotland Yard (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re BUCHANAN-WOLLASTON'S CONVEYANCE, CURTIS *v.*
 BUCHANAN-WOLLASTON.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and du Parcq,
 L.JJ.), **March 24, 27, 28, 1939.**]

*Real Property—Joint tenancy—Statutory trust for sale—Application to court
 for order for sale—Contract not to sell without unanimous consent—
 Overriding trust—Law of Property Act, 1925 (c. 20), ss. 30, 35, 36.*

Four owners of houses purchased land adjacent to their houses in order to preserve the amenities of those houses. The parties subsequently executed a deed which provided, *inter alia*, how the land purchased should be dealt with. The land consisted of two portions, known as the northern and southern land respectively. The deed provided that, as regards the northern portion, the unanimous consent of the parties was required with regard to any dealing with it, and that any question affecting the southern portion was to be determined by a majority vote. In the deed it was stated that references to parties thereto included a reference to their heirs, executors, administrators and assigns. One of the original parties to the deed desired that the land should be sold and claimed that a sale should be ordered by the court on the ground that the statutory trust for sale overrode the provisions of the deed. It was also contended that the provisions regarding a sale of the land as contained in the deed were only to apply during the joint lives of the contracting parties:—

HELD : (i) the provisions regarding the consent to a sale of the land were not limited to the joint lives of the parties. Such provisions must be construed with the definition clause, and, therefore, the consent might be given by the heirs, executors, administrators and assigns of the parties.

(ii) the appellant was bound by his contract, and the statutory trust for sale did not override the provisions of that contract.

[EDITORIAL NOTE.] The substantial point in this case is whether the statutory trusts overrode the terms of the express contract entered into by the parties at the time the land was purchased. In *Re Flint, Flint v. Flint* (1), it was held that the statutory trusts overrode an option given by a will made before 1926. The distinction between the two cases, so far as concerns the overriding of other provisions by the statutory trusts, is clear, and it seems contrary to the equitable doctrines enforced by the court that the plaintiff should be allowed to ignore his own contract. Apart from this consideration, the present case strengthens the view that it is only in exceptional cases that an order for sale will be made where the trustees do not unanimously agree to the sale.

AS TO LAND SUBJECT TO TRUST FOR SALE, see HALSBURY, *Hailsham Edn.*, Vol. 29, p. 770, para. 1073 ; and FOR CASES, see DIGEST, Vol. 40, p. 784, No. 3149.]

Cases referred to : .

(1) *Re Flint, Flint v. Flint*, [1927] 1 Ch. 570 ; 40 Digest 783, 3140 ; 96 L.J.Ch. 248 ; 137 L.T. 178.

(2) *Re Thomas, Thomas v. Thompson*, [1930] 1 Ch. 194; Digest Supp.; 99 L.J.Ch. 140; 142 L.T. 310.

APPEAL by the plaintiff from an order of FARWELL, J., dated Nov. 10, 1938, and an application by the appellant for leave to adduce further evidence. The facts are fully set out in the judgment of SIR WILFRID

A GREENE, M.R.

Roger Turnbull for the appellant.

G. R. Upjohn for the respondents.

Turnbull: The appellant is entitled to ask that the property be sold. There is nothing in the covenant which prohibits him from doing that.

B As regards the northern portion of the land, the clause in the deed of covenant requiring the unanimous consent of all parties was operative during their joint lives only. With regard to the southern portion of the property, the matter falls to be regulated under another clause, which provides for the determination of the matter by the vote of the parties.

C It is said on behalf of the respondents that no relief can be given with regard to the southern portion because the parties had agreed how the matter should be determined. The statutory trust for sale overrides the veto on sale. The real point in this case is whether or not the appellant is entitled to say that the statutory trusts are operative and whether or

D not he can ask the court to enforce them. If the conveyance stood alone, the effect of the Law of Property Act, 1925, ss. 35, 36, would be to impose an immediate binding trust for sale, with power to postpone the sale. There is nothing in cl. 1 of the conveyance to prevent any party from asking for a sale. Clause 5 provides that questions affecting the

E land shall be determined by agreement, or, failing agreement, by vote. The provision as regards agreement was applicable only so long as all the parties were living. The effect of the statutory trusts has been considered in *Re Flint, Flint v. Flint* (1) and in *Re Thomas, Thomas v. Thompson* (2).

The appellant is not asking that the land should be sold free from all
F restrictions. The appellant desires the land to be sold, but he is willing that proper restrictions should be attached. If the two cases cited are acted upon, the trust for sale overrides the deed of covenant altogether. If the restrictions on the appellant are operative, for what period do they last? The joint lives of the parties is an appropriate period. Otherwise
G there will be an indefinite period and an indefinite number of people who will have to consent. The statutory trust for sale ought to be executed by the court, and relief on that footing ought to be granted.

Upjohn: The appellant's case is that there is something in the Law of Property Act, 1925, which enables him to disregard the terms of the
H contract entered into by the parties. In arguing the reverse of that before FARWELL, J., I pointed out that the voting machinery provided by the contract has not been invoked. The appellant says that he is entitled to a sale notwithstanding the contract. He has never suggested that there had been a meeting, or that there had been any voting, or that a scheme had been put forward, or that there had been some wrongful

failure to carry out any agreed scheme. With regard to the southern portion of land, machinery is provided whereby a sale can take place subject to certain restrictions. If that machinery is put into motion and a resolution is passed and there is a failure to carry out the resolution, one can understand that an application should be made to the court based on a claim for specific relief. The present application, however, is premature. This is a complete answer to the claim that there should be some execution of the statutory trusts. The parties entered into a deed with the object of preventing the land purchased jointly from being used in any manner which might be a nuisance or detrimental to their respective properties. It is said by the appellant that there is something in the Law of Property Act, 1925, which enables the agreement to be disregarded. Sect. 26, however, says that the trustees ought to have regard to the wishes of the beneficiaries. Sect. 26 contemplates the consent of persons being required for the exercise of a trust for sale. In *Re Flint, Flint v. Flint* (1), everything which is relevant to the present case is *obiter*, as it was there held that the right of pre-emption was to extend only to the powers of sale under the will, and not to a sale under the statutory trusts. It is material to see whether or not this agreement has come to an end. The object of purchasing the land was that the amenities of the houses should be preserved. It would be illogical if the agreement should fall through because one of the parties died. One of them might have died the following day, and thus the whole object of the contract would have been frustrated. There is nothing in the agreement to show that it should come to an end on the death of one of the parties. It is for an indefinite period, and, while any two of the parties are alive, cl. 1 is absolute in its terms. No difficulty arises with regard to the word "assign." It means an assign of the benefit of the deed. Nobody can answer question 2 of the summons, which asks the nature of the restrictive covenants, as the parties do not know, until they come to sell, what the restrictions may be.

Turnbull, in reply: The whole object of the deed is to protect the persons who own the houses. It is not for the purpose of protecting the persons who own the land. At the time of the execution of the deed, they were the same persons. A difficulty arises, however, the moment one of the parties sells his house to one purchaser and his interest in the land to another. Miss Serjeant sold her house to a purchaser who is not before the court. She sold her share in the land to the appellant. If the submission made on behalf of the respondents is correct, it is extremely difficult to see who are the parties who are to give the unanimous consent. The words "or the parties thereto" must mean the original parties to the deed.

SIR WILFRID GREENE, M.R.: In Aug., 1928, the respondent, Mr. Buchanan-Wollaston, the appellant, Mr. Curtis, a Miss Serjeant and the late Mr. Thomas William Seager Berry, who were all residents and owners of houses at Lowestoft, purchased, by means of a sum put

up by them in varying amounts, a plot of land in the neighbourhood of their houses. That land was conveyed to them as joint tenants by a conveyance dated Aug. 22, 1928. On Sept. 17, 1928, they executed a deed which gives rise to the present controversy. The deed recites the acquisition of the piece of land, the proportions in which the purchasers

A subscribed the purchase money, their ownership of their houses in the vicinity of this land (which is called the joint land) and that the joint land was purchased by them :

[with] the object of securing that it should not be used in any manner which might be a nuisance or annoyance or cause any detriment to or depreciation in value of their said properties.

B

Then comes a series of covenants introduced by these words :

Now each of the parties hereto in consideration of the covenants and stipulations hereinafter contained hereby mutually covenants and agrees with each of the others of them as follows . . .

C Then cl. 1 provides as follows :

No part of the joint land shall be dealt with in any way which may be or become a nuisance or annoyance or cause any detriment to or depreciation in value of any of the before-mentioned properties of the parties hereto respectively.

That was the leading purpose of this document. Then there are numerous

D other clauses which do not affect the present question. Clause 4 provides as follows :

No building structure or erection of any kind . . . shall except with the consent of each of the parties hereto which consent must be a unanimous consent be at any time erected on [a defined portion of the joint land identified by a line drawn upon the annexed plan].

E That line defined the northern part of the joint land. Then at the end of the clause is the following sentence :

Any transaction in connection with the parcel of land mentioned in this clause [the northern part] must be unanimously agreed to by all the parties hereto.

F Clause 5 provides for the distribution of the profits from any sale or lease or other dealing with the land among the parties in proportion to the amount that they had subscribed towards the purchase money, and a similar apportionment in respect of outgoings. Then cl. 6 provides as follows :

G Save so far as is otherwise expressly provided by this deed [which would import the special provision with regard to the northern land in cl. 4] all questions arising with reference to the joint land shall be determined in such manner as may be agreed between the parties hereto or as failing such agreement shall be determined by vote.

Then it sets out what votes the parties are to have. Clause 4 requires,

H as I have said, unanimous agreement with regard to transactions affecting the northern land. Clause 6 in its application to the southern land enables any question relating to it to be determined by a majority vote. Clause 7 then provides for transfers or assignments of the rights or interests of the parties under the deed. It will be noticed that the rights or interests under the deed are not merely the contractual rights conferred on the parties

by the various covenants entered into, but include also their interests in the profits and the proceeds of sale. I need not read that clause. It contains a provision giving the other parties, or the survivors or survivor of them, a right to have the offer first made to them. In 1930 by a deed indorsed upon this deed, Miss Serjeant assigned to the appellant her interest under this deed. A question has been raised as to whether or not that assignment is one of which the other parties, Mr. Buchanan-Wollaston and the executors of Mr. Seager Berry (who is now dead), can complain on some such ground, as I understand it, as that there was no offer to them. I do not quite know what the ground is. Anyhow, there is a ground of complaint, but it is agreed here, for the purposes of this appeal, that the present appellant must be treated as being the owner of the rights which that deed of transfer from Miss Serjeant purports to give him. That is without prejudice to such right, if any, as Mr. Buchanan-Wollaston and the executors of Mr. Seager Berry may have to attack that document in some other proceedings. Then cl. 8 provides as follows :

In the construction of this deed where the context admits any reference to the parties hereto includes a reference to the heirs executors administrators and assigns of each of such parties respectively and a reference to any of such parties includes a reference to the heirs executors administrators and assigns of such party.

As I have said, Miss Serjeant has sold her interest, and she has left the neighbourhood. Her house is now owned by some person who is not affected by the present controversy. Mr. Buchanan-Wollaston still retains his house, for the benefit of which, with the others, this transaction was entered into. Mr. Curtis has left the neighbourhood and sold his house, and Mr. Seager Berry is dead, but I understand that his executors are still the owners of his house. However that may be, the present position is that Mr. Buchanan-Wollaston, at any rate, is still the owner of his house, and claims to be entitled to enforce the provisions of this deed.

On Apr. 21, 1938, Mr. Curtis issued an originating summons, and the respondents to it were Mr. Buchanan-Wollaston and the executors of Mr. Seager Berry. The substantial relief for which he asked by that summons is as follows, in cl. 3 :

That pursuant to the Law of Property Act, 1925, s. 30, the first defendant may be ordered to concur with the plaintiff in selling the said land.

The basis of that application lies in the fact that, by reason of the conveyance to these four persons as joint tenants, the property was held as from the execution of the conveyance upon trust for sale. That is the effect of the Law of Property Act, 1925, ss. 35, 36. By sect. 30 it is provided as follows :

If the trustees for sale refuse to sell or to exercise any of the powers conferred by either of the last two sections, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit.

Mr. Curtis, being anxious to have the land sold, by his summons is asking the court to make an order for sale. In connection with that sale, he

- also raises by the summons a question as to what restrictions, if any, affect the land, and the object of that is, really, to find out what, upon a sale of the land, are the restrictions that ought to be imposed upon a purchaser. Mr. Buchanan-Wollaston is apparently prepared to agree to a sale, provided that the restrictions which commend themselves to him
- A are imposed upon the sale. However, when I look at the deed by itself, it seems to me that the proper method of securing—according to the contract of the parties—the consent of Mr. Buchanan-Wollaston, and the consent of the executors of Mr. Seager Berry, if their consent be required—and as to that I shall have something to say presently—is
- B to obtain, with regard to the northern land, the unanimous agreement of the parties, and, with regard to the southern land, a vote of the parties under cl. 6 upon that question. Neither of those two things has been done. There has been no unanimous agreement, because Mr. Buchanan-Wollaston has not agreed to any proposed transaction. A sale, if proposed,
- C must, of course, be a sale on terms, and what those terms are to be is a matter for unanimous agreement. That is, so far as the northern land is concerned. The same principle applies with regard to the southern land under cl. 6, although the terms there are not so onerous, because a majority vote is sufficient, and unanimous agreement is not required.
- D That being the object of the application, FARWELL, J., dismissed it, and he dismissed it on the ground that the appellant, Mr. Curtis, being a person who had contracted to the effect which I have mentioned as to the way in which questions relating to this land should be dealt with, could not come to the court and ask the court to act in a way inconsistent
- E with his own contractual obligations. The argument which Mr. Turnbull addressed to us on behalf of the appellant began with this proposition. This is logically the first argument which he puts forward. He says that, even if it be assumed that, under this document, in the absence of unanimous agreement as to the northern land, and in the absence of a proper
- F vote upon a definite question with regard to the southern land, those contractual restrictions are still in force, nevertheless they are overridden by the provisions of the Law of Property Act, 1925, which imposes upon the trustees the obligation of selling under the trust for sale, save in so far as the power of postponement under sect. 25 is exercised by the
- G unanimous consent of the trustees. He says that the court has no option but to give effect to the statutory direction comprised in sects. 35 and 36. He then says that, of course, when the court orders a sale, it can only order a sale subject to restrictions which are to be binding upon the purchaser, and the actual form of those restrictions is a matter which
- H the court can determine, and one of the objects of the summons is to ascertain what form those restrictions ought to take. The argument ignores the fact that a party to the deed who is asked to concur in a sale is not limited to submitting to a sale in which the only restrictions would be those in cl. 1. He is in a very much stronger position, because he is entitled to say: “ You cannot sell this land without my agreement, and

I am not disposed to give my agreement unless I can get something more suitable to my ideas." However that may be, the whole basis of Mr. Turnbull's argument, in my opinion, falls away as soon as the true position is appreciated. The statutory trust for sale is one which must be exercised, and was intended by the legislature to be exercised, subject to the power of the court to enforce it. That appears in sect. 30. However, the legislature must be taken to have known the principles upon which the court of equity proceeds when asked by one of a body of trustees, or other persons who are not in agreement, to lend its assistance for the purpose of carrying out a trust. The legislature must be taken to have known the principles upon which those powers are exercised, and the power of the court to enforce the trust for sale must be exercised in regard to the statutory trust for sale according to well-known and ordinary principles. I am not going to enter into a discussion of the question as to whether or not the provisions of the Act in creating this trust for sale have the effect of overriding or nullifying any provisions in the instrument which in some way clog or fetter the trust for sale. That is a question which came into the discussion in *Re Flint, Flint v. Flint* (1) before ASTBURY, J. If and when that particular question comes to be considered again, it may require some full examination, but what I am saying now is not affected by the decision in that case, because it seems to me that the court of equity, when asked to enforce the trust for sale, whether one created by a settlement or a will or one created by the statute, must look into all the circumstances of the case and consider whether or not, at the particular moment and in the particular circumstances when the application is made to it, it is right and proper that such an order shall be made. In considering a question of that kind, in circumstances such as these, the court is bound to look at the contract into which the parties have entered and to ask itself the question whether or not the person applying for execution of the trust for sale is a person whose voice should be allowed to prevail. In the present case, FARWELL, J., approached the matter from that angle, and gave a perfectly definite and unhesitating answer to it, with which I entirely agree. He said, in effect: "Here is a person who has contracted with others for a particular purpose, and the effect of the contract is to impose certain restrictions upon the power of the trustees to sell this land." Without going into the question which I mentioned a moment ago as to overriding or not overriding those things, he said: "It is not right that in those circumstances, on the invitation of a person who has not acted in accordance with the contract, and is opposed by other persons interested, the court of equity should exercise the power of the court and make an order for sale." That, of course, does not mean that in other circumstances, at some future time, the court will not lend its aid. Circumstances may change. If all the parties died and all their houses were sold, for example, I apprehend that the court, if asked to enforce a statutory trust for sale, would not be disposed to listen to arguments against such a sale adduced by people who had no real

interest in keeping this land unsold. Questions of that kind can be decided if and when they arise. In the present circumstances (and it is sufficient to confine my reasons to present circumstances), it seems to me that the appellant cannot ask the court to help him in the way in which he desires.

- A In saying what I have said, I have assumed a particular construction of the sentence at the end of cl. 4 and of the reference in cl. 5 to the necessity of an agreement between the parties, or a majority vote for the purpose of determining questions relating to the southern land. It was said by Mr. Turnbull that he is not asking the court to do something
- B contrary to those provisions, because he says that those provisions, upon their true construction, are no longer operative, his reason being that, on their true construction, they only apply during the joint lives of the four named parties. Of course, if that were the true construction there would be substance in the argument, but, in my opinion, that is not the true
- C construction of those provisions. It seems to me that the reference there to parties imports the definition clause, cl. 8, and includes, not merely the parties, but also their heirs, executors, administrators and assigns. I see no difficulty in doing what cl. 8 tells me to do—namely, to import that interpretation—and on that basis, in the present circumstances,
- D the provisions in cll. 4 and 6, which I have been reading, remain on foot. It seems to me, therefore, that FARWELL, J., in the circumstances as they stood before him, and as they stand before us, was perfectly justified and perfectly right in taking the line which he did.

- There is before us an application for leave to read certain further
- E evidence. The nature of that evidence has been explained to us, and it is to this effect. Mr. Curtis is anxious to establish that there has been a determination by vote under cl. 6 of the deed, the vote being a vote at a meeting which he, and he alone, attended, although the respondents were invited to come. That application, of course, would have been
- F relevant only to a case quite different from that which has been put forward in the summons. The summons is not based on the view, so far as the southern land is concerned, that the restriction imposed by cl. 6, requiring agreement or a majority vote, has in fact been complied with, and that, therefore, there is some effective and concrete subject-matter
- G with regard to which the court can make an order. That is not the basis of the summons at all. The summons is not concerned with such a matter of fact, and whether or not such a determination has been reached is a pure question of fact, involving, of course, questions of law in regard to the construction of the clause itself. However, no such case was made
- H in the summons originally. If such a case had been made in the summons originally, there is no reason whatever why that evidence should not have been put before FARWELL, J. It seems to me that on two grounds the application to admit that evidence is an application which must be refused. The first ground is that it is not relevant to the only case that was made below, and the only case that was raised by the summons, and

the second ground is that in any event it is evidence that could quite easily have been, and ought to have been, put before the court below, if it had any relevance to the appellant's case. In those circumstances, both the appeal and the motion for leave to adduce further evidence must be dismissed with costs.

CLAUSON, L.J. : I agree. A

DU PARCQ, L.J. : I also agree.

Appeal and motion for leave to adduce further evidence dismissed with costs.

Solicitors : *Grundy, Izod & Co.*, agents for *Wiltshire, Sons & Jordan*, B
Lowestoft (for the appellant); *George Thatcher & Son*, agents for
Sherwood & Co., Westminster (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

WHITHAM v. BULLOCK. C

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), **March 16, 17, 31, 1939.**]

Landlord and Tenant—Division of premises included in lease—Assignee of part forced to pay whole rent—Contribution from assignee of other part—Recoupment. D

In 1927, part of the property comprised in a long lease was assigned to an assignee at an apportioned rent of £3 14s. 11½d., and a month later the remainder of the property was assigned to another assignee at an apportioned rent of £2, the balance of the rent reserved by the original lease. The defendant and the plaintiffs in the present action were assignees of the assignees in 1927. The defendant had failed to pay the rent due in respect of the property included in the first agreement. The plaintiffs were forced by a threat of distress to pay the whole rent reserved by the lease. The plaintiffs sought to recover the proportion of that rent payable in respect of the defendant's premises :— E

HELD : (i) the covenant to pay the apportioned part of the rent did not run with the land and was not enforceable under the Law of Property Act, 1925, s. 80 (2) (4). F

(ii) there was no privity of estate between the parties upon which an action for the apportioned rent could be based.

(iii) the Law of Property Act, 1925, s. 190 (3), did not create a statutory contract between the parties. G

(iv) there was a community of interest between the parties, and the plaintiff, having been forced by threat of distress to pay a sum for which the defendant could have been sued by the landlord, was entitled to be recouped the amount he had been forced to pay, although he himself was not liable to be sued by the landlord.

[EDITORIAL NOTE.] The judgment in this case carefully considers the position of assignees of a part of the premises comprised in a lease. After dealing with a number of subsidiary points, it approaches the question of contribution. It would appear that it is not a case of contribution, since the landlord cannot sue each of the parties for the rent of the whole premises. It is held, however, to be a case for recoupment, but this is apparently based upon the fact that the landlord can bring an action against the defendant for £3 14s. 11½d., the apportioned rent. It H

has been suggested that such an action lies only for a proportionate part of the whole rent to be settled by a jury upon evidence of the respective values of the apportioned parts at the date of the severance, and upon the authorities there is much support for this view. However, the decision will be a very useful one in practice, since, in effect, after a subdivision of leasehold property, the tenant of an apportioned part can obtain contribution from the tenant of the other part.

- A** AS TO RIGHT AND LIABILITIES OF ASSIGNEE OF PART OF PREMISES, see HALSBURY, Hailsham Edn., Vol. 20, p. 362, para. 436; and FOR CASES, see DIGEST, Vol. 31, pp. 403, 404, Nos. 5499-5504.]

Cases referred to:

- B** (1) *Austerberry v. Oldham Corpn.* (1885), 29 Ch.D. 750; 31 Digest 142, 2769; 55 L.J.Ch. 633; 53 L.T. 543.
- (2) *Bliss v. Collins* (1822), 5 B. & Ald. 876; 31 Digest 264, 4061.
- (3) *Curtis v. Spitty* (1835), 1 Bing. N.C. 756; 31 Digest 404, 5503; 4 L.J.C.P. 236.
- (4) *Dering v. Winchelsea (Earl)* (1787), 1 Cox, Eq. Cas. 318; 20 Digest 249, 136.
- (5) *Edmunds v. Wallingford* (1885), 14 Q.B.D. 811; 21 Digest 554, 1271; 54 L.J.Q.B. 305; 52 L.T. 720; *previous proceedings* (1884), 1 Cab. & El. 334.
- C** (6) *Bonner v. Tottenham & Edmonton Permanent Investment Building Society*, [1899] 1 Q.B. 161; 31 Digest 414, 5604; 68 L.J.Q.B. 114; 79 L.T. 611.
- (7) *Johnson v. Wild* (1890), 44 Ch.D. 146; 30 Digest 497, 1562; 59 L.J.Ch. 322; 62 L.T. 537.
- (8) *Exall v. Partridge* (1799), 8 Term Rep. 308; 31 Digest 403, 5492.
- (9) *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; 26 Digest 146, 1099; 62 L.J.Ch. 773; 68 L.T. 753.
- D** (10) *Hunter v. Hunt* (1845), 1 C.B. 300; 30 Digest 497, 1561; 14 L.J.C.P. 113; 4 L.T.O.S. 374.
- (11) *Christie v. Barker* (1884), 53 L.J.Q.B. 537; 12 Digest 538, 4469.
- (12) *Gamon v. Vernon* (1678), 2 Lev. 231; 31 Digest 403, 5501.
- (13) *Moule v. Garrett* (1872), L.R. 7 Exch. 101; 31 Digest 412, 5587; 41 L.J.Ex. 62; 26 L.T. 367.
- E** (14) *Johnson v. Royal Mail Steam Packet Co.* (1867), L.R. 3 C.P. 38; 26 Digest 225, 1766; 37 L.J.C.P. 33; 17 L.T. 445.
- (15) *Salts v. Battersby*, [1910] 2 K.B. 155; 31 Digest 263, 4054; 79 L.J.K.B. 937; 102 L.T. 730.
- (16) *United Dairies, Ltd. v. Public Trustee*, [1923] 1 K.B. 469; 31 Digest 404, 5507; 92 L.J.K.B. 326; 128 L.T. 768.
- F** (17) *Stevenson v. Lambard* (1802), 2 East, 575; 31 Digest 263, 4051.

G APPEAL by the plaintiffs from a judgment of His Honour JUDGE BURGIS in the Burnley County Court, dated Dec. 15, 1938, and reported 6 L.J.N.C.C.R. 1, in favour of the defendant, on the ground that the plaintiff had no cause of action. The facts are fully set out in the judgment of CLAUSON, L.J.

D. Ll. Jenkins, K.C., and *I. C. Duthie* for the appellants.

G. R. Upjohn for the respondent.

H *Jenkins, K.C.*: The parties were both bound to the common landlord by privity of estate. When one person is compelled to pay a sum for which another person is liable, he may recover that sum from him. Where there is a common burden, the court will see that it is distributed equitably. [Counsel referred to *Wolmershausen v. Gullick* (9).] *Hunter v. Hunt* (10) and *Johnson v. Wild* (7) do not fully support so general statement as that in WOODFALL ON LANDLORD AND TENANT, 23rd Edn.,

p. 331, and they are distinguishable from the present case. In the Law of Property Act, 1925, s. 190 (3), (4), the use of the words "apportionment" and "apportioned" imports a statutory contract between the parties. [Counsel referred to *Hunter v. Hunt* (10), *Johnson v. Wild* (7), *Christie v. Barker* (11), *Gamon v. Vernon* (12), *Wolmershausen v. Gullick* (9), *Moule v. Garrett* (13), *Bonner v. Tottenham & Edmonton Permanent Investment Building Society* (6), *Johnson v. Royal Mail Steam Packet Co.* (14), *Salts v. Battersby* (15), *Edmunds v. Wallingford* (5) and *Austerberry v. Oldham Corpn.* (1).]

Upjohn : Though the landlord could distrain on any part of the premises for the whole rent, he could sue for a proportional part only. The Landlord and Tenant Act, 1927, s. 20, which allows either of two tenants to apply for apportionment, would be unnecessary if the appellants' contention were right. For them to succeed, there must be a liability to pay the respondent's rent on her default. As to the Law of Property Act, 1925, s. 190, it is merely declaratory. It cannot be concluded from the right given by the section that it was the appellants' duty to pay the respondent's rent. [Counsel referred to *United Dairies, Ltd. v. Public Trustee* (16), *Dering v. Winchelsea (Earl)* (4), *Stevenson v. Lambard* (17) and *Bliss v. Collins* (2).]

CLAUSON, L.J. [delivering the judgment of the court] : In 1862, the freeholders of a plot of land demised it for 999 years at a yearly rent of £5 14s. 11½d. by a common form lease containing the usual reservation of rent, the usual covenants to pay rent, and the usual provisions for re-entry on non-payment. By virtue of divers mesne assignments and acts in the law, which it is not necessary to particularise, the term of years became vested in two persons named Ibbetson. By deed of July 10, 1927, they assigned one part of the plot (which may conveniently be referred to as the Homer Street portion) for the residue then unexpired of the 999-years' term to one Hayes at an apportioned rent of £3 14s. 11½d., part of the rent of £5 14s. 11½d. This assignment, by reference to the Law of Property Act, 1925, had implied in it the usual covenants as referred to in sect. 77 (1) (D) (i) and Sched. II, Part X, cl. (i), binding the assignee Hayes to pay the apportioned rent, and to indemnify the Ibbetsons against that part of the rent. It also had implied in it the usual covenants as referred to in sect. 77 (1) (D) (ii) and Sched. II, Part X, cl. (ii), binding the assignors to pay the balance of the rent—namely, £2 per annum. This Homer Street portion, by reason of an assignment by Hayes' executors, passed to the defendant, the assignment, by reference to the Law of Property Act, 1925, having implied in it the usual covenants referred to in sect. 77 (1) (D) (i) and Sched. II, Part X, cl. (i), binding the defendant to pay the apportioned rent of £3 14s. 11½d. and to indemnify Hayes' estate against that part of the rent of £5 14s. 11½d.

By deed of Aug. 31, 1927, the Ibbetsons assigned the rest of the plot

(which may conveniently be referred to as 207, Accrington Street) for the residue then unexpired of the 999-years' term to certain assignees, who covenanted (oddly enough) to collect the £3 14s. 11½d. (the apportioned rent of the Homer Street portion) and pay the £3 14s. 11½d. so collected, plus the £2 (the part of the total rent apportioned, as already stated, to 207, Accrington Street), to the persons entitled to receive the same, and also covenanted in the usual form to indemnify the Ibbetsons against the £2 rent. There were various subsequent assignments, all in substantially the same form, under which 207, Accrington Street, became vested in the plaintiffs for the residue of the 999 years.

Before turning to the facts of the case, it may be convenient to consider some features of the legal position between the parties as it stood from the period in 1931 when the defendant became assignee of the Homer Street portion, the plaintiffs being assignees of 207, Accrington Street. The freeholder was not bound by the apportionment that had been arranged, to which he was no party, and there can be no doubt that he remained entitled to distrain on any part of the two plots for any unpaid part of the rent of £5 14s. 11½d. It would appear that either the plaintiffs or the defendant—or, indeed, the freeholder—could take steps to obtain an apportionment of this rent by the Minister of Agriculture under the Landlord and Tenant Act, 1927, s. 20, but no such application has ever been made. It is quite clear that there is nothing in any of the covenants entered into by the plaintiffs and defendant in the assignments to them respectively which would give either of them a right to sue the other in respect of any failure to pay their respective apportioned parts of the rent. It was suggested before the county court judge, and quite correctly, that, by virtue of the Law of Property Act, 1925, s. 77 (5), the plaintiff could sue Hayes or his estate in respect of a failure to pay the rent apportioned to Homer Street, and it was further suggested that sect. 80 (2) placed the burden of Hayes' covenant upon the defendant as his successor in title. The county court judge held, and, in our view, correctly, that sect. 80 (2), which must be read with sect. 80 (4), does not place on the defendant the burden of Hayes' covenant. That section places the burden of a covenant on the successors in title of the covenantor only if the covenant is one of which the burden, whether at law or in equity, passes to the successors in title of the covenantor, and there can be no doubt, this being a positive covenant, that the burden of it does not so pass: *Austerberry v. Oldham Corpn.* (1).

It appears to have been suggested on the plaintiffs' behalf before the county court judge that there was privity of estate between the plaintiffs and the defendant which might lead to some right of action by the plaintiffs against the defendant in case the defendant failed to pay. This argument was rightly rejected by the county court judge, for it seems to have had a basis only in a misapprehension of the meaning of privity of estate. Reference was made to the Law of Property Act, 1925, s. 190 (3), which unquestionably has the effect of declaring that,

without prejudice to the rights of the freeholder, the apportionment of the rent between the Homer Street portion and 207, Accrington Street, is binding as between the plaintiffs and the defendant. It was ingeniously suggested that sect. 190 (3) operates to bring into being a statutory contract between the plaintiffs and defendant to pay their respective apportioned parts of the rent. We are quite clear that such a statutory contract cannot be spelt out of the section. It is convenient to mention here one further point, and that is that, by virtue of the Law of Property Act, 1925, s. 190 (4), if either the plaintiffs or the defendant failed to pay their or her apportioned part of the rent, and the others or other pays it, the paying party could distrain on the defaulting party's lot so as to obtain reimbursement of the amount so paid. A
B

We may now turn to the facts which have given rise to the present proceedings. The defendant's plot, the Homer Street portion, was occupied by 4 houses. These became subject to demolition under the Housing Acts, and in due course the site was cleared. The Homer Street portion is now, it seems, an unoccupied waste. Not unnaturally, the defendant stopped paying her apportioned share of the rent. The freeholder thereupon threatened to distrain on 207, Accrington Street. The plaintiffs, having in their house chattels of a value amply sufficient to pay the distress, not unnaturally saved their goods by paying, for 3 successive quarters, not only their own apportioned share of the total rent, but also the defendant's share as well, which was of course essential if the distress was to be staved off. Further, not unnaturally, they have proceeded in this action to claim to be reimbursed the defendant's share of the rent so paid. It will be observed that the plaintiffs' right of distress on the defendant's plot, given by the Law of Property Act, 1925, s. 190, is just as valueless to them as no doubt his right of distress against that plot was to the freeholder. C
D
E

Before us, the plaintiffs' claim was put on a ground which does not appear to have been fully submitted to the county court judge. In the first place, counsel for the plaintiffs argued that the freeholder could recover against either the plaintiffs or the defendant the whole of the £5 14s. 11½d. rent. It was admitted by counsel for the defendant that, if that were the case, the plaintiffs would have in equity a valid claim against the defendant for contribution of the defendant's share. He quite properly accepted the principle conveniently stated in ROWLATT ON PRINCIPAL AND SURETY, 3rd Edn., p. 173 : F
G

If as between several persons or properties all equally liable at law to the same demand, it would be equitable that the burden should fall in a certain way, the court will so far as possible, having regard to the solvency of the different parties, see that, if the burden is placed inequitably by the exercise of the legal right, its incidence should be afterwards readjusted. H

Here the readjustment is a perfectly simple matter, since the apportionment of £2 per annum to the plaintiffs and £3 14s. 11½d. to the defendant is admittedly binding on them both, though not on the landlord. Counsel for the defendant, however, contended that, on the severance occasioned

by the assignment of the term in one part of the land to one party and of the term in the residue of the land to another party, the freeholder ceases to be in a position to sue for the whole rent, and can only sue the tenants of the severed parts in respect of a proportion of the rent, the proportion as it would seem, to be settled by a jury: *Bliss v.*

- A *Collins* (2). For reasons which will appear later, we do not find it necessary to decide this question. In view of the interesting arguments of counsel, however, we would observe that, while the argument for the defendant is supported by statements in modern textbooks, *Curtis v. Spitty* (3), the case usually cited in this connection, would seem to show
- B that in 1835 TINDAL, C.J., thought that the matter turned on “a very nice and difficult question”—namely, whether or not there is privity of estate in respect of the whole land comprised in the term between the landlord and an assignee of part only of the land so comprised. There is, of course, no doubt, as his Lordship points out, that the rent
- C for the whole becomes due out of each and every part of the land, a proposition which is the basis of the unquestionable fact that the assignment of part only of the land does not affect the landlord’s right to distrain on that part for the rent of the whole. When, if ever, the point comes up for decision, it will no doubt be borne in mind that authorities
- D on the operation of covenants relating to rent may not necessarily conclude questions upon the scope of the action in debt for rent.

Counsel for the plaintiffs, however, pointed out that, even assuming that the tenant of a part of land cannot be sued by the landlord for more than his due proportion of the rent, it still remains that the plaintiffs

E in this case were forced by law to discharge, at peril of losing their goods, not only their own proportion of the rent—namely, £2—but also the defendant’s proportion of the rent—namely, £3 14s. 11½d. The plaintiffs’ case for recoupment to them by the defendant of his proportion of rent was accordingly put on the footing that, in respect of the £3 14s. 11½d.,

F although the plaintiffs could not *ex hypothesi* be sued by the landlord, the sum was one which either the plaintiffs or the defendant could be forced by the landlord to bear, though, in the case of the plaintiffs, only by process of distress, and, in the case of the defendant, either by process of distress or by action for payment. The case was thus, it was said,

G one in which two persons could be made, directly or indirectly, to pay, and it was said that, since the landlord, in exercise of his legal rights, had chosen to secure to himself the £3 14s. 11½d. at the expense of the plaintiffs, the court would see that the burden, being inequitably placed by the exercise of the landlord’s legal rights, should be equitably re-

H adjusted between the parties. We are satisfied that this argument is sound, and in accordance with the principles of equity as recognised ever since the decision of the Court of Exchequer in *Dering v. Winchelsea (Earl)* (4) in 1787. The last-mentioned case is one of contribution, and not one of recoupment, but the doctrines applicable, whether to recoupment or to contribution, are in principle the same. The matter

was authoritatively expounded in this court by LINDLEY, L.J., in *Edmunds v. Wallingford* (5), at p. 814, and again by VAUGHAN WILLIAMS, L.J., in *Bonner v. Tottenham & Edmonton Permanent Investment Building Society* (6), and the general principle is now quite beyond controversy. We were, however, invited by counsel for the defendant to hold that the principle ought not to be applied save in cases in which the parties as between whom contribution or indemnity is claimed are each liable to be sued in an action at law or suit in equity by the third party. However, it was pointed out by VAUGHAN WILLIAMS, L.J., in *Bonner v. Tottenham & Edmonton Permanent Investment Building Society* (6), at p. 174, that, whatever might have been the case at law, in equity the principle had to be regarded as covering cases in which there was community of interest in the subject-matter to which the burden was attached which had been enforced against the plaintiff alone, coupled with the benefit to the defendant, even though there was no common liability to be sued. In the present case, there is obviously community of interest between the plaintiffs and the defendant in the subject-matter to which the burden is attached—namely, the two plots, which are subject to the common burden of being liable to process of distress for the whole of £5 14s. 11½d. The defendant is liable to be sued for the £3 14s. 11½d., and, although the plaintiffs *ex hypothesi* cannot be sued for this sum by the landlord, they have in fact been forced to pay the sum by threat of the process of distress to which they were admittedly liable. It was suggested that the decision of CHITTY, J., in *Johnson v. Wild* (7) supported the contention put forward by the defendant's counsel, but, the crucial difference is that in that case the defendant, being a sub-lessee, could not be sued for the sum which the plaintiff, an assignee of part of the land in lease, had been forced to pay. In the present case, the defendant could have been sued by the landlord, and is liable to the landlord for the sum which the plaintiffs have, under stress of legal compulsion, been forced to pay. It was for a precisely corresponding reason that the defendants in *Bonner v. Tottenham & Edmonton Permanent Investment Building Society* (6) escaped liability to the plaintiff in that action. It seems to be entirely in accordance with principle that the defendant in such an action as the present should not be liable to be sued for any sum for which the landlord could not have sued him. It by no means follows, however, that, though the plaintiffs have been forced to pay the sum, they are debarred from suing for it because the sum in question, though they could be forced to pay it by legal process, was not a sum for which the landlord could sue them. Their equity arises from the fact that they have effectually, and under legal process, been made to pay. It may not be immaterial to recall that at law (see *Exall v. Partridge* (8)) the plaintiff whose goods had been seized in distraint but who was under no liability to pay the rent was entitled to indemnity against the persons who might have been sued for the rent by the landlord. It was essential to the defendant's

liability that they should be persons who could have been sued by the landlord, but of course the plaintiff, *ex hypothesi*, was under no liability to the landlord, though, under stress of legal process, he had been forced to pay him. The truth is that, while, in such cases as the present, the defendant must be a person who can be sued by the third party, the

A plaintiff is entitled to sue for contribution or recoupment if he has paid the demand under stress of legal process, though he is not liable to be directly sued. Accordingly, we are of opinion that the plaintiffs are entitled to recover against the defendant the latter's proportion of rent paid by the plaintiffs under stress of their liability to distress. There

B is no dispute as to the figures. The appeal will be allowed and judgment entered for the plaintiffs for £4 3s. 4d., with costs in the county court on the C scale. The defendant must pay the costs of the appeal. The judge certified under C.C.R., Ord. 47, rr. 12, 21, and these certificates will stand and regard will be had to them in taxing the plaintiffs' costs

C below.

Judgment for the plaintiffs for £4 3s. 4d., with costs.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Birtwells*, Burnley (for the appellants); *John B. Purchase & Clark*, agents for *Roberts, Riley & Anderson*, Burnley (for the respondent).

D [Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.]

E SRI RAJA VYRICHERLA NARAYANA GAJAPATIRAJU
BAHADUR GARU v. REVENUE DIVISIONAL OFFICER,
VIZAGAPATAM.

[PRIVY COUNCIL (Lord Macmillan, Lord Romer and Sir George Rankin),
November 14, 15, 17, 18, 21, 22, 1938, February 23, 1939.]

F Privy Council—Madras—Compulsory purchase—Compensation—Assessment—
Acquiring authority only possible purchaser—Potentiality—Water supply
—Indian Land Acquisition Act, 1894, ss. 23, 24.

G The Vizagapatam harbour, the construction of which was begun in 1920, was formed by making excavations in swampy land situated to the south-west of the town and by dredging a deep-water channel in the creek to the south of the town which led from the swampy land to the Bay of Bengal. The appellant was the owner of property known as Lova Gardens on the south of the land acquired by the harbour authority, the gardens being formed by a valley running from high ground on the south-west to low ground on the north-east adjoining the land of the harbour authority on the south of the creek. The upper portion of this valley consisted of a shallow basin in the hills, which formed the catchment area of a spring of water yielding an average of 50,000 gallons of drinking water per day and situated at a height of 150 ft. above sea-level.

H The development of the harbour site for industrial purposes required a gravity water supply, and for this purpose a scheme was carried out under the provisions of the Indian Land Acquisition Act, 1894, involving the compulsory acquisition from the appellant of the shallow basin forming the catchment area of the spring, the site of the spring itself, and a narrow strip of land below the spring. The question was the basis of the assessment of compensation upon such compulsory acquisition and

in particular the value to be placed upon the particular potentiality of the land—namely, the water supply :—

HELD : (i) in the circumstances of the present case, where the acquiring authority was the only possible purchaser, an arbitrator must ascertain to the best of his ability the price which would be paid by a willing purchaser to a willing vendor, having regard to the particular potentiality of the land, in the same way as he would where there was a number of purchasers. The value was not limited to the value of the land without the potentiality.

(ii) the land must be valued, not at the sum it would be worth after acquisition, but at its value before acquisition.

[EDITORIAL NOTE.] It is agreed that the principles of assessment to be applied under the Indian Land Acquisition Act, 1894, are the same as those to be applied under the Land Clauses Act, 1845, without having regard to the operation of the Acquisition of Land (Assessment of Compensation) Act, 1919. The position, therefore, is governed by the English authorities on this matter. The short point is the effect upon the principles of such assessment where the only possible purchaser of the land is the acquiring authority, and this aspect of the matter is fully dealt with in the judgment of their Lordships.

AS TO PRINCIPLES OF ASSESSMENT, see HALSBURY, Hailsham Edn., Vol. 6, pp. 45-48, paras. 43-45; and FOR CASES, see DIGEST, Vol. 11, pp. 125-131, Nos. 158-188.]

Cases referred to :

- (1) *Glass v. Inland Revenue*, [1915] S.C. 449.
- (2) *Inland Revenue Comrs. v. Clay*, *Inland Revenue Comrs. v. Buchanan*, [1914] 3 K.B. 466; 39 Digest 226, 63; 83 L.J.K.B. 1425; 111 L.T. 484.
- (3) *Re Gough & Aspatia, Silloth & District Joint Water Board*, [1904] 1 K.B. 417; 11 Digest 127, 168; 73 L.J.K.B. 228; 90 L.T. 43.
- (4) *Re Lucas & Chesterfield Gas & Water Board*, [1909] 1 K.B. 16; 11 Digest 127, 169; 77 L.J.K.B. 1009; 99 L.T. 767; *on appeal from* [1908] 1 K.B. 571.
- (5) *Cedar Rapids Manufacturing & Power Co. v. Lacoste*, [1914] A.C. 569; 11 Digest 130, 187; 83 L.J.P.C. 162; 110 L.T. 873.
- (6) *Fraser v. Fraserville City*, [1917] A.C. 187; 11 Digest 124, case e; 86 L.J.P.C. 91.
- (7) *Sidney v. North Eastern Ry. Co.*, [1914] 3 K.B. 629; 11 Digest 128, 171; 83 L.J.K.B. 1640; 111 L.T. 677; *subsequent proceedings*, [1916] 2 K.B. 760.

APPEAL from a judgment of the High Court at Madras (WADSWORTH and STODART, JJ.), dated May 4, 1937, allowing the respondent's appeal from a judgment of the Subordinate Judge of Vizagapatam. The facts of the case are fully set out in the judgment of their Lordships delivered by LORD ROMER.

Lionel Cohen, K.C., P. V. Subba Row and Y. V. R. Rao for the appellant.

H. U. Willink, K.C., W. Wallach and W. W. K. Page for the respondent.

LORD ROMER : This appeal is concerned with the question of what is the proper sum to be awarded to the appellant by way of compensation in respect of the compulsory acquisition by the Vizagapatam harbour authority of certain land of his adjoining the harbour, the respondent being the representative of such authority for the purposes of this appeal. The circumstances in which the land was acquired are as follow. The

Vizagapatam harbour, the construction of which appears to have been begun in 1920, was formed by making excavations in swampy land situate to the south-west of the town of Vizagapatam and by dredging a deep-water channel in the creek to the south of that town which led from the swampy land into the Bay of Bengal. On the south of the land acquired

A by the harbour authority for the purpose of these works is situated the property of the appellant, known as Lova Gardens. These gardens are formed by a valley which runs down from high ground on the south-west to low ground on the north-east adjoining the land of the harbour authority on the south of the above-mentioned creek. The upper portion

B of this valley consists of a shallow basin in the hills which forms the catchment area of a spring of water that emerges from the ground at the north-east end of the basin. This spring, which appears to yield even in the dry season an average flow of 50,000 gallons of excellent drinking water per day, is situated at a height of 150 ft. above sea-level. Until

C a part of it was diverted by the harbour authority, as narrated hereafter, the whole of the water from this spring ran down the valley to the lower end of Lova Gardens and from thence discharged itself into the creek. By the early part of 1926, the construction of the harbour had made considerable progress, and it was hoped that it would be ready for

D opening by the end of 1929. With that end in view, a portion of the harbour site had been allocated by the harbour authority for the purpose of being used by oil companies and other industrial concerns. The entire south side of the harbour had indeed been allocated for industrial purposes, but the harbour land was very malarious, and so, too, was much of the

E land to the south of the harbour, including the lower part of Lova Gardens, a circumstance that gave rise to some anxiety in the minds of the harbour authority. They accordingly consulted Mr. Senior White, who is an expert upon the subject, and upon May 1, 1926, that gentleman, after making an anti-malarial survey of the area, embodied the results

F of his survey in a report. This report disclosed a serious state of affairs in the villages situated in the area, of which there appear to have been at that time no less than 32, nine of which were on the south side of the creek. These villages, or many of them, seem to have been dependent upon wells for their water supply, and these wells formed breeding-grounds

G for the malaria-bearing mosquitoes. It is plain from the report that persons carrying on business at the harbour would run a serious risk of contracting malaria as matters then stood, and this would greatly hamper the development of the harbour site for industrial purposes. Further, as Mr. White pointed out, there was the possibility of shipping at the quays

H becoming infected, and the mere possibility, which had already been suggested in the Indian press, was detrimental to the interest of the port. It appears from a letter written by Mr. Rattenbury, the deputy engineer-in-chief to the harbour authority, dated July 14, 1926, that, in these circumstances, Mr. White was "very keen on closing the wells along the south side," and this, the letter adds, could be done if a gravity water

supply were provided instead. Such a supply could be furnished by the spring at the upper end of Lova Gardens, and accordingly the harbour authority conceived the idea of using the water from the spring for the purpose of freeing the harbour from malaria. Apart altogether from the assistance that this supply of water would give to the prevention of malaria, however, there was much to justify its acquisition on its own merits, as was pointed out in a letter of Oct. 2, 1926, written by one of the harbour officials, for the water could be made available as a supply to the oil companies and other industrial concerns that might be established in the southern part of the harbour area. The method of utilising the water for these purposes which was ultimately adopted was this. The water was to be diverted from the lower part of the valley, to which reference has been made, and led from a short distance below the spring directly to the harbour area by means of a tunnel to be made through the hilly land to the north-west of the valley. This scheme, which was in due course carried out, and is now in operation, involved the acquisition from the appellant of the shallow basin forming the catchment area of the spring, the site of the spring itself, and a narrow strip of land below the spring. In due course, the necessary steps were taken for the compulsory acquisition of this land under the provisions of the Land Acquisition Act, 1894, the notification under sect. 4 (1) of the Act being given on Feb. 13, 1928. The public purpose for which the land was needed was stated in the notification to be the execution of anti-malarial works, the total area to be acquired from the appellant being 108.9 acres. Of this acreage, the catchment area, including the site of the spring referred to as 2-1D and 2-1E, accounted for 105.92 acres, and the land below the spring referred to as 2-1B (0.53 acres), 2-1C (0.48 acres) and 2-3B (1.97 acres) accounted for the rest.

After the giving of the notification, the procedure laid down in sects. 6, 7 and 8 of the Act having been followed, the collector took the steps prescribed by sects. 9, 10 and 11 to determine the compensation which ought to be allowed to the appellant for his land. It is provided by sect. 15 of the Act that in so doing the collector shall be guided by the provisions contained in sects. 23 and 24, and it will be convenient before continuing this narrative to turn to these provisions. So far as material to the present purpose, they are as follow :

23. (1) In determining the amount of compensation to be awarded for land acquired under this Act, the court shall take into consideration, first, the market-value of the land at the date of the publication of the declaration relating thereto under sect. 6 ; secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the collector's taking possession thereof ; thirdly, the damage (if any) sustained by the person interested, at the time of the collector's taking possession of the land, by reason of severing such land from his other land ; fourthly, the damage (if any) sustained by the person interested, at the time of the collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings.

24. But the court shall not take into consideration, first, the degree of urgency which has led to the acquisition ; secondly, any disinclination of the person interested to part with the land acquired ; . . . fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired.

The general principles for determining compensation which are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act, 1845, before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act, 1919. As was said by WADSWORTH, J., when giving judgment in the High Court in the present case :

It is well settled that English decisions under the Lands Clauses Act, 1845, lay down principles which are equally applicable to proceedings under the Indian Act. The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. This does not mean, however, that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth. However, the question of what it may be worth—that is to say, to what extent it should affect the compensation to be awarded—is one which will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor, a sentimental value far in excess of its market value. The compensation must not be increased, however, by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at the market price, to use the words of sect. 23 of the Indian Act. It is perhaps desirable in this connection to say something about this expression “the market price.” There is not in general any market for land, in the sense in which one speaks of a market for shares, or a market for sugar, or any like commodity. The value of any such article at any particular time can readily be ascertained by ascertaining the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by the market value in sect. 23. Sometimes, it happens, however, that the land to be valued possesses some unusual, and it may be, unique, features as regards its position or its potentialities. In such a case, the arbitrator, in determining its value, will have no market value to guide him, and he will have to ascertain as best he may from the materials before him what a willing vendor might reasonably expect to obtain from a willing purchaser for the land in that particular position and with those particular potentialities, for it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under

the Indian Act being the date of the notification under sect. 4 (1)), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority, indeed, is required for this proposition. It is a self-evident one. No one can suppose, in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land, or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land, as the case may be. It is plain that in ascertaining its value the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in sect. 24 (5) of the Act and is sometimes expressed by saying that it is the possibilities of the land, and not its realised possibilities, that must be taken into consideration.

But how is the increase accruing to the value of the land by reason of its potentialities or possibilities to be measured? In the case instanced above of land possessing the possibility of being used for building purposes, the arbitrator (which expression in this judgment includes any person who has to determine the value) would probably have before him evidence of the prices paid in the neighbourhood for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land might never be so required, or might not be so required for a considerable time. In the case, however, of land possessing potentialities of such an unusual nature that the arbitrator has not similar cases to guide him, the value of the land must be ascertained in some other way. In such a case, moreover, there will, in all probability, be only a very limited number of persons capable of turning the potentialities of the land to account. If the owner of the land is the only person who can do so, the value to him must be ascertained by reference to what profit he might thereby have been able to derive from the land in the future. Take as an example the case of an owner of vacant land that adjoins his factory. The land possesses the potentiality of being profitably used for an extension of the factory, but the owner is the only person who can turn that potentiality to account. In valuing the land, however, as between him and a willing purchaser, the value to him of the potentiality would necessarily have to be included. The same consideration will apply to cases where the owner is not the only person, but is merely one of the persons, able to turn the potentiality to account. The value to him of the potentiality will not be less than the profit that would accrue to him by making use of it had he retained it in his own possession. Take the case, however, where the owner is himself unable to turn the potentiality to account, whether by promotion of a company or otherwise. In such a case, there may be several other persons who would be able to do so, or there may be only one. If there are more than one,

it is recognised by all the authorities which have been cited to their Lordships, and seems to be consistent with common sense, that the owner is entitled to be paid the value to him of the potentiality, though the ascertainment of its value may in many cases be a matter of considerable difficulty.

- A It has been suggested that, in order to ascertain it, the arbitrator is to hold an imaginary auction, but with all respect to those who have made the suggestion, their Lordships are unable to see how this is going to help the arbitrator. At such imaginary auction, all possible purchasers must, no doubt, be imagined as attending. They will include, therefore, persons
- B who are in no way interested in the land's potentialities, and such persons will bid no higher price than the value of similar land without its potentialities. This value in this judgment is referred to as the *poramboke* value. They will also include, however, what may be called the purchasers of the potentialities. There may also be present some speculative buyers
- C who will be willing to bid more than the *poramboke* value upon the chance of being able to resell to a purchaser of the potentiality at a profit. It would seem, however, logically, that such purchasers should be disregarded, for the object of the imaginary auction is to discover what a purchaser of the potentiality will be willing to pay for it, and this cannot
- D depend upon the presence at the auction of persons willing to pay less, unless it be that such ultimate purchaser is to be considered willing to pay whatever fantastic price he may be forced up to by competition, and no one suggests this. Proceeding, therefore, with the imaginary auction at which are present two classes of buyers—namely, the *poramboke*
- E buyers and the potentiality buyers—the former will disappear from the bidding as soon as the *poramboke* value has been reached, and the bidding will thereafter be confined to the potentiality buyers. At what figure, however, will this bidding stop? As already pointed out, it cannot be imagined as going on until the ultimate purchaser has been driven up to a
- F fantastic price by the competition, for he is *ex hypothesi* a willing purchaser, and not one who is forced by circumstances to buy. Nor can the bidding be imagined to stop at the first advance on the *poramboke* value, for the vendor is a willing vendor, and not one compelled by circumstances to sell his potentiality for anything he can get. The arbitrator
- G will, therefore, continue the imaginary bidding until a bid is reached which, in the arbitrator's estimate, represents the true value of the potentiality to the vendor. The auction will, therefore, have been an entire waste of the arbitrator's imagination. If the value of the potentiality be Rs. x , the imaginary auction will have taken place to ascertain the value of x
- H from the imaginary bidding, and all that can be said is that the bidding will stop at Rs. x . The truth of the matter is that the value of the potentiality must be ascertained by the arbitrator on such materials as are available to him, and without indulging in feats of the imagination.

Their Lordships would not have thought it necessary to deal with this question of the imaginary auction at such length were it not for the fact

that in argument before them the respondent's counsel endeavoured to show, by reference to such an auction, that, when there was only one possible purchaser of the potentiality, the value of it to the vendor was nil. That is to say, the value of the land with the potentiality was substantially nothing in excess of its value without it. This argument, it may be observed, commended itself to LORD CULLEN in the Scottish case of *Glass v. Inland Revenue* (1), referred to below, but was rejected by the majority of the court. A

Upon the question of the value of the potentiality where there is only one possible purchaser, there are some authorities to which their Lordships will have to refer. However, dealing with the matter apart from authority, it would seem that the value should be the sum which the arbitrator estimates that a willing purchaser will pay, and not what a purchaser will pay under compulsion. It was contended on behalf of the respondent that, at an auction where there is only one possible purchaser of the potentiality, the bidding will rise above the *poramboke* value only sufficiently to enable the land to be knocked down to that purchaser. However, if the potentiality is of value to the vendor if there happen to be two or more possible purchasers, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion, and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it. An instance of this is to be found in *Inland Revenue Commissioners v. Clay* (2). That was a case under the Finance (1909-1910) Act, 1910, s. 25 (1), and is not perhaps strictly relevant to the present case. The facts of it, however, are worth recalling. There was a house of which the value to anyone except certain trustees was no more than £750. These trustees were the owners of a nurses' home which adjoined the house, and they were desirous of extending their premises. They accordingly purchased the house for £1,000, the owner thus receiving £250 for the potentiality his house possessed by reason of its position adjoining the nurses' home. It was held by the Court of Appeal that £1,000 was the value of the house to a willing seller. LORD COZENS-HARDY, M.R., said, at p. 472 : B C D E F

To say that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely with reference to its ordinary agricultural value, seems to me absurd. G

Had the house in that case been acquired compulsorily by a railway company, or a local authority under the provisions of the Lands Clauses Consolidation Act, 1845, before its purchase by the trustees, the house ought, in their Lordships' opinion, and for the reasons already given, to have been valued at £1,000, and not merely at £750. H

A case in many respects similar to *Clay's* case (2) is that of *Glass v. Inland Revenue* (1). That also was a case arising under the Finance (1909-1910) Act, 1910, and was one where land of an agricultural value of

£3,379 had been sold in 1911 to certain water commissioners for £5,000, they being the only possible purchasers of the land for other than agricultural purposes. It was held that in valuing the land as on Apr. 30, 1909, the possibility that the commissioners might give more than the agricultural value for the land must be taken into consideration. In the words of LORD JOHNSTON, at p. 465, it was necessary, in order to fix the value of the land on Apr. 30, 1909, to ascertain :

... what is to be attributed to the probability of the water commissioners, in the circumstances, desiring to acquire the property, and what figure, in a friendly negotiation, they would be prepared to pay for it.

However this may be, it is said that the matter assumes a totally different complexion when the only possible purchaser is the one who has obtained the compulsory powers of purchase, and that this has been established by authorities that should be followed by this Board. Of these authorities, the first one to which reference need be made is *Re Gough & Aspatia, Silloth & District Joint Water Board* (3). In that case, it was not proved that the acquiring authority was the only possible purchaser, and it may be that all that the Court of Appeal decided was that it was not incumbent upon the claimant for compensation to specify that any particular body of persons were possible purchasers, though the judgment of LORD ALVERSTONE, L.C.J., seems quite consistent with the view that the potentiality must be valued even if the acquiring authority be its only possible purchaser. However, it is contended that SIR RICHARD HENN COLLINS, M.R., expressed the contrary view. After referring to the particular adaptability of the land that was in question, and to the fact that it ought to find a place in the estimate of the amount of compensation, he said, at p. 423 :

That view is supported by authority and long practice ; but underlying it is the question, which is one of fact for the arbitrator, whether there is a possible market for the site, and in determining that the statutory purchase is not to be considered.

However, SIR RICHARD HENN COLLINS, M.R., said that the purchase, not the purchaser, was to be left out of consideration. Any enhanced value attaching to the land by reason of the fact that it has been compulsorily acquired for the purpose of the acquiring authority must always be disregarded, and SIR RICHARD HENN COLLINS, M.R., meant no more than that. *Re Lucas & Chesterfield Gas & Water Board* (4) must, however, be considered in greater detail, for it is on certain dicta of FLETCHER MOULTON, L.J., in that case that the respondent chiefly relies. The land which had been compulsorily acquired in that case had potentialities for which the acquiring authority was not the only possible purchaser. The point now being considered did not, therefore, arise for decision. In the court below, however, BRAY, J., had said, at p. 579 :

I come back to the question whether the fact that no buyer for reservoir purposes can be found, except a buyer who has obtained parliamentary powers, prevents the special value of the land being marketable. In my opinion the answer I ought to give to that question is "No."

In the Court of Appeal, VAUGHAN WILLIAMS, L.J., said, at p. 25 :

I agree with BRAY, J., that the fact that no buyer for reservoir purposes can be

found except a buyer who has obtained parliamentary powers does not prevent the special value being marketable. . .

He stated that one of his reasons for so agreeing was that the fact that the board (who were the acquiring authority) might themselves become possible purchasers, who would give a special price for the land, ought to be considered. FLETCHER MOULTON, L.J., however, said that the decided cases to his mind laid down the principle that, when the special value exists only for the particular purchaser who has obtained powers of compulsory purchase, it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the land to be purchased under it. He added that, where there were other possible purchasers, there would be competition among them, and this fact would enhance the market price. He did not specify the authorities which laid down the principle in question, and their Lordships are not aware of any that would justify it. It must, of course, be conceded that the existence of the scheme must not be allowed to enhance the price, if by "scheme" is meant the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality. The valuation must always be made as though no such powers had been acquired, and the only use that can be made of the scheme is as evidence that the acquiring authority can properly be regarded as possible purchasers. Their Lordships have some difficulty, however, in seeing why the taking into consideration of the fact that the special value exists for those purchasers only should be said to be allowing the existence of the scheme to enhance the value of the lands. The only difference which the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land, and that is a circumstance that is never allowed to enhance the value. If, on the other hand, by "the scheme" FLETCHER MOULTON, L.J., meant the intention formed by the acquiring authority of exploiting the potentiality of the land, his statement can only mean that the value of the land is not to be enhanced by the fact that they are possible purchasers. The result of this would be that, even in a case where there are two or more possible purchasers, their existence must not be allowed to enhance the value, for each purchaser must be deemed to have a scheme in the sense supposed, and the enhancement of value due to their competition which FLETCHER MOULTON, L.J., envisages will in fact be due to the "schemes." In these circumstances, their Lordships are not prepared to follow the *dictum* of FLETCHER MOULTON, L.J., in the *Lucas* case (4), and prefer the opinion there expressed by VAUGHAN WILLIAMS, L.J. It is said, however, that the *dictum* of FLETCHER MOULTON, L.J., has already received the approval of this Board on more than one occasion. In no case to which their Lordships' attention has been called, however, was the question of the effect of there being only one possible purchaser

of the land being considered by the Board, and any approval of the statement of the law by FLETCHER MOULTON, L.J., must be regarded merely as an approval of such statement so far as it affected the particular question then before the Board. It is sufficient in this connection to refer to two of such cases. In *Cedar Rapids Manufacturing & Power Co. v. Lacoste* (5), LORD DUNEDIN, in delivering the judgment of the Board, said, at p. 576 :

The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *Re Lucas & Chesterfield Gas & Water Board* (4), where VAUGHAN WILLIAMS and FLETCHER MOULTON, L.JJ., deal with the whole subject exhaustively and accurately.

As has already been pointed out, the opinions of VAUGHAN WILLIAMS and FLETCHER MOULTON, L.JJ., upon the question now being considered were diametrically opposed to one another. The other case is *Fraser v. Fraserville City* (6), where LORD BUCKMASTER, in delivering the judgment of the Board, said, at p. 194 :

The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *Re Lucas & Chesterfield Gas & Water Board* (4), *Cedar Rapids Manufacturing & Power Co. v. Lacoste* (5), and *Sidney v. North Eastern Ry. Co.* (7). The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this : that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case.

It will be observed that LORD BUCKMASTER makes no reference whatsoever to the present question, but in one of the cases to which he referred—namely, *Sidney v. North Eastern Ry. Co.* (7)—ROWLATT, J., is thought to have said much the same as had been said by FLETCHER MOULTON, L.J. In that case, certain land possessed the potentiality of being used for the purposes of a railway. That potentiality was capable of being turned to account by a railway company which had obtained compulsory powers of acquiring it and by the proprietor of an adjoining colliery. In assessing the compensation to be paid by the railway company for the land, the arbitrator took into account the possibility that, but for its acquisition by the railway company, the colliery proprietor might have purchased it, but he did not take into consideration the possibility that the company might in friendly negotiation have been willing to pay more for it than the colliery proprietor. In their Lordships' opinion, he was wrong in this. The Divisional Court, however, on a case stated, upheld the decision of the arbitrator. In the course of his judgment, ROWLATT, J., said, at p. 637 :

Now, if and so long as there are several competitors including the actual taker who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land is an element of value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail to what can any further value be attributed ? The point has been reached when the owner is offered more than the land is worth to him for his

own purposes and all that any one else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers, the owner need not sell to that one and that one would need to make higher and yet higher offers. In respect of what would he make them? There can only be one answer—in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell without obtaining for himself a share in that value. Nothing representing this can be allowed.

If and so far as this means that the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor, and not the price that would be paid by a driven purchaser to an unwilling vendor, their Lordships agree. So far, however, as it means that the possibility of the promoter as a willing purchaser being willing to pay more than other competitors, or, in cases where he is the only purchaser of the potentiality, more than the value of the land without the potentiality, is to be disregarded, their Lordships venture respectfully to differ from ROWLATT, J. For these reasons, their Lordships have come to the conclusion that, even where the only possible purchaser of the land's potentiality is the authority which has obtained the compulsory powers, the arbitrator, in awarding compensation, must ascertain to the best of his ability the price which would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers, and that he is no more confined to awarding the land's *poramboke* value in the former case than he is in the latter.

It is now necessary to take up once more the narrative of the events that have led up to this appeal. On Jan. 5, 1929, the appellant filed his claim for compensation. It was certainly not lacking in courage, but it was lacking, strangely enough, in any suggestion that the land had a potential value as a source from which water might be supplied to persons or corporations outside Lova Gardens. He did, however, allege that Lova Gardens had a valuable potentiality as a building site, and that such potentiality would be destroyed if he were deprived of the spring. He accordingly claimed Rs. 2,50,000 in this respect, calling it "damages sustained by severance," though in strictness it should have been called damages sustained by reason of the acquisition injuriously affecting his other property. He also claimed Rs. 1,200 per acre in respect of the land and Rs. 16,050 as the value of the masonry structures, roads, and trees on the land, the total claim amounting to Rs. 3,96,730.

On Jan. 18, 1929, the land acquisition officer made his award. He allowed in all a sum of Rs. 17,745.1.3, including the 15 per cent. addition prescribed by sect. 23 (2) of the Act. It appears from the grounds of award bearing the same date that he thought nothing of the potentiality of Lova Gardens as a building site, and the existence of any such potentiality has now disappeared from the case, and need not be referred to again. He valued the land at Rs. 50 per acre, with the exception of the land numbered 2-3B, which he valued at Rs. 300 per acre. As to the claim in respect of "damages sustained by severance," he thought that

the rest of the appellant's land was probably better off without the water from the spring than with it. The lower part of the gardens, which was marshy and malarious, had too much water as it was. In any case, he considered that the appellant would be amply compensated for the loss of the spring water by the Rs. 5,000 that he awarded under this head.

- A** The appellant's claim of Rs. 2,50,000 was, he said, preposterous. He also awarded a sum of Rs. 4,493 in respect of trees and buildings. The appellant thereupon required that the matter should be referred to the court for determination under sect. 18 of the Act, and in due course it came on for hearing before the subordinate judge of Vizagapatam.
- B** It was then claimed on the appellant's behalf that, but for its acquisition, the spring could have been used by him as a source of water supply either to the harbour authority or to the oil companies and others residing or carrying on business in the harbour area, and the appellant claimed to be compensated upon this footing. After a lengthy hearing before him,
- C** in the course of which many questions of law and fact not now in issue were discussed, the judge made his award. He found as a fact, and the fact cannot be disputed, that the water of the spring was on Feb. 13, 1928, capable of being used as a source of water supply to persons outside the plaintiff's land. He also found that the only possible buyers of the
- D** water at that date were the harbour authority itself and the oil companies and labour camps which might be established as a result of the development of the harbour, and stated that this fact would be taken into consideration in fixing the amount of compensation. After considering the authorities on the subject, however, he came to the conclusion as
- E** a matter of law that the value to a vendor of a potentiality of his land can be assessed even though there are no other possible purchasers beyond the acquiring authority. Other principles of law stated by him for his guidance in making his award were that it was the contingent possibility of the user that had to be taken as the basis of valuation, and
- F** not the realised possibility, and that the use to which the acquiring authority had actually put the property could be taken as a strong piece of evidence to show that the property acquired could be put to such use by the owner at the date of acquisition. Applying these principles, he found that the value of the land acquired, including the spring, was
- G** Rs. 1,05,000, which, with the addition of the 15 per cent. under sect. 23 (2) of the Act, amounted to Rs. 1,20,750. The Rs. 17,745.1.3 awarded by the land acquisition officer had been paid to the appellant and received by him under protest, and, deducting this sum from the Rs. 1,20,750, there remained Rs. 1,03,004.14.9 due to the appellant. This sum he
- H** decreed in favour of the appellant, with certain interest. The valuation of Rs. 1,05,000 was arrived at in this way. Evidence had been given before the judge by two witnesses on behalf of the appellant as to what would be a proper charge for water supplied to the harbour area from the spring, and they estimated the charge at Rs. 1.8.0 per 1,000 gallons. The judge, however, said that, taking into consideration the conclusions

arrived at by him, which were presumably the conclusions of law and findings of fact referred to above, he thought that it would be reasonable and proper to fix the value of the acquired property—the water source—on the date of the acquisition on the basis of R. 1 per 1,000 gallons. Taking the normal supply of water at 50,000 gallons per day, this gave as the gross annual value of the water the sum of Rs. 18,250. He A
 estimated that maintenance charges, depreciation of machinery, and interest on the capital outlay would come to Rs. 12,273, but, taking these items at the round figure of Rs. 13,000, the net annual income from the spring would be Rs. 5,250. This he capitalised at 20 years' purchase, and so arrived at the sum of Rs. 1,05,000. Having regard, amongst other B
 things, to the extravagant claims put forward by the appellant in the first instance, he awarded him no costs.

From this decision an appeal was taken by the present respondent to the High Court at Madras, the appellant lodging a memorandum of cross-objections to the valuation of the subordinate judge which need not be C
 specified. The appeal was heard by WADSWORTH and STODART, JJ., and judgment allowing the appeal was delivered on May 4, 1937. The reasons for this decision given by WADSWORTH, J., in whose judgment STODART, J., concurred, may be summarised in the following way. The scheme for utilisation of the water and the carrying out of anti-malarial operations D
 in the valley—that is, the Lova Gardens—was not really an independent scheme. It was linked up with a bigger scheme for getting rid of breeding-places of mosquitoes all round the southern side of the harbour, so as to make the whole of that area fit for development. At the time when this scheme was promulgated, the whole of that area was undeveloped. E
 It was full of malaria, and was incapable of any profitable use apart from the success of the anti-malarial campaign of which this acquisition was part. It was not conceivable that the present appellant himself would ever have been able to develop a water supply scheme, carrying out the necessary anti-malarial works and thereby encouraging business concerns F
 to occupy the harbour land and buy water from him. The conclusion, therefore, must be that the special adaptability of the land for the supply of drinking water had no value apart from the scheme for which the acquisition was made. The harbour authority, therefore, was, at the date of the notification, the only reasonably possible purchaser for the G
 drinking water supply on the appellant's land, and, this being so, the subordinate judge had erred in awarding compensation for the special adaptability of the land to supply drinking water to persons outside the appellant's land. After referring to the authorities, and in particular to the *dictum* of FLETCHER MOULTON, L.J., in the *Lucas* case (4), he said : H

There can be little doubt that this exposition of the law when applied to the facts of the present case as we have found them would justify the conclusion that no value can be awarded to the special adaptability of this land for supplying drinking water to the harbour alone, if it can be shown that the land cannot have any value as a source of drinking water to anyone else.

By the harbour the judge meant, of course, the harbour authority.

STODART, J., who, as already stated, concurred in the judgment of WADSWORTH, J., added :

A It is not contended that any other public authority or private undertaker except the harbour authority would ever have come forward to develop this area and make it habitable. Thus the value of the . . . spring as a source of drinking water . . . arose entirely from the anti-malarial scheme carried out by the harbour authority and depended on the success of that scheme. To my mind, sect. 24 (5) of the Land Acquisition Act is completely applicable to the facts of this case.

The appeal was accordingly allowed with costs there and below, and the award of the land acquisition officer was restored *in toto*. The memorandum of cross-objections was dismissed with costs. From that B judgment, the necessary leave having been obtained, the appellant now appeals to His Majesty in Council.

Their Lordships agree with the High Court that on Feb. 13, 1928, the only really possible purchaser of the special adaptability of the appellant's land as a water supply was the harbour authority. The C position at that time was that the harbour was so far advanced that its opening in a few years was in contemplation. It was expected that, when that had taken place, oil companies and other industrial concerns, with their attendant labour camps, would be attracted to the harbour area, and they would all require to be supplied with D water. It is plain that neither the appellant nor any purchaser from him would encounter any engineering difficulties in conducting the water from the spring to the southern boundary of the harbour area. Nor would they encounter any engineering difficulty in conducting the water from that boundary to the premises of the oil companies E and other concerns. They would, however, have had to obtain the consent of the harbour authority to lay the necessary pipes in the harbour area itself, and the possibility of such consent being refused would have to be taken into consideration in estimating the value to the appellant of the special adaptability of his land, though the risk of such consent being F refused was not a serious one, assuming that there was no other source from which the water could be profitably supplied by the harbour authority itself. There was, however, on Feb. 13, 1928, a much more serious matter to be taken into consideration. As already pointed out, the harbour area was at that date a highly malarious place, little calcu- G lated to prove attractive as a site for any industrial concern. Unless, therefore, this state of affairs were remedied, there would be no customers for the appellant's water, and the value to him of the special adaptability was nil. It is true that there was a practical certainty of the harbour authority taking steps to render the site as free as possible from malaria, H for, if they did not, the harbour would not be used to any great extent, even as a port of call. In order to carry out the necessary anti-malarial works, however, it was essential for the harbour authority to obtain a supply of drinking water from some source other than the wells in the area, which were largely responsible for the malarious condition of the area and were going to be closed. On Feb. 13, 1928, the appellant would,

therefore, have been in this dilemma. If the only other source of water were the appellant's spring, the harbour authority would be the only possible purchaser. If, on the other hand, the authority could obtain water from other sources sufficient both for the anti-malarial work and for the supply of the traders in the harbour area, the appellant would almost certainly be refused permission to carry his competing supply over the authority's land. In point of fact, there was at one time an alternative scheme on foot for obtaining water, known as the Meghadrigedda scheme. The scheme was to be for the benefit of the municipality of Vizagapatam, the Bengal Nagpur Railway, and the harbour. The scheme aimed at a supply of 1,000,000 gallons per day, of which the harbour was to have 150,000 gallons per day. The scheme has not been proceeded with, but it is impossible to say what would have been done about it had the spring in Lova Gardens not been acquired. In these circumstances, the possibility of the appellant's water being made available for the harbour by anyone other than the harbour authority was altogether negligible, and the only enhancement in the value to the appellant of his land by reason of its special adaptability as a water supply was the sum that the harbour authority, as a willing purchaser, would have been willing to give in excess of the land's *poramboke* value. Their Lordships have given their reasons for thinking, contrary to the view taken by the High Court, that such sum must be taken into consideration in fixing the compensation payable to the appellant, and that such sum is not to be treated as being a negligible one merely because the harbour authority was the only possible purchaser.

It remains to deal with sect. 24 (5) of the Land Acquisition Act. That subsection, as applied to the present case, means no more than that, in valuing the appellant's land on Feb. 13, 1928, it must be valued as it then stood, and not as it would stand when the land had been acquired and the water on it used for ridding the harbour area of malaria. The harbour authority would otherwise be made to pay for the water twice over. The subsection does not mean, however, that the possibility that a particular purchaser of land will give a higher price for it by reason of its possessing a special adaptability must be disregarded merely because the land will be more valuable in his hands when he exploits that adaptability than it would be if left in the hands of the vendor who was unable to exploit it. In *Clay's* case (2), for instance, the house, after being added to the nurses' home, was no doubt more valuable than it was before. That indeed, was the reason why the trustees of the home paid £250 more than any other purchaser would have paid. The house in that case was held to be of the value of £1,000, not because that was its value after being put to the use for which it was acquired, but because that was the price which the willing purchaser was prepared to pay for its acquisition. In the present case, the land must be valued, not at the sum which it would be worth after it had been acquired by the harbour authority and used for anti-malarial purposes, but at the sum which the

authority "in a friendly negotiation" (to use the words of LORD JOHNSTON) would be willing to pay on Feb. 13, 1928, in order to acquire it for those purposes.

- A Returning to the award made in the present case by the subordinate judge, it is to be observed that, in valuing the land with its special adaptability as being worth Rs. 1,05,000 to the appellant, he did so on the footing that the appellant would himself have been in a position to supply the water to the harbour but for the compulsory acquisition by the harbour authority. He would also seem to have so valued it upon the footing that the spring could have been made an income-earning concern on Feb. 13, 1928. He would otherwise have made a substantial discount from the Rs. 1,05,000. It is plain, therefore, that, in view of the facts that the water could not be exploited by the appellant himself and that it would necessarily be some years before the water would become a profit-earning asset in their hands, the harbour authority, however willing purchasers they might be, would not have agreed to pay anything like that sum. In these circumstances, the matter should in strictness be referred back to the subordinate judge to revise his award. Both the parties to this appeal, however, have asked their Lordships, with a view to saving expense, to state what should be the proper amount of the award, and this their Lordships have consented to do. Giving the matter the best consideration they can, their Lordships are of opinion that the total price which the harbour authority would have been willing to pay on Feb. 13, 1928, for the land acquired is the sum of Rs. 40,000, and this sum, with the additional 15 per cent., amounts to Rs. 46,000. In their Lordships' judgment, the order of the High Court of May 4, 1937, should be discharged, except in so far as it dismissed the present appellant's memorandum of objections with costs. The amount decreed by the subordinate judge in favour of the appellant should be reduced from Rs. 103,004.14.9 to Rs. 28,254.14.9, with interest as stated in his award.
- F His order as to costs must stand. The respondent must pay the appellant's costs before the High Court and his costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed with costs.

- G Solicitors: *T. L. Wilson & Co.* (for the appellant); *The Solicitor, India Office* (for the respondent).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

R. v. BOLTON RECORDER, *Ex parte* McVITTIE.[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Macnaghten and Singleton, JJ.), **March 30, 1939.**]*Public Health—Dangerous and dilapidated structure—Order to repair or demolish—Works of repair unspecified in order—Whether order defective—Public Health Act, 1936 (c. 49), s. 58.* A

A cinema was damaged by fire, with the result that it became a dangerous or dilapidated building or structure. A complaint was made to the justices, who made an order under the Public Health Act, 1936, s. 58, calling upon the owner to execute works of repair or restoration or, if he so elected, to take such steps by demolishing the structure and removing any rubbish resulting from the demolition as might be necessary for remedying the cause of complaint. The order was confirmed by general quarter sessions, whose decision was now challenged by the applicant on the ground that it was defective and bad in law in that it purported to confirm the justices' order, which did not specify the works of restoration or repair to be executed and/or things to be done for the remedy of the cause of complaint :— B

HELD : as the Public Health Act, 1936, s. 58, makes no provision for giving to the owner particulars of repair or restoration required in a case like the present, and as such provision is made in another part of the statute relating to abatement of nuisance, the order was properly made and confirmed. C

[**EDITORIAL NOTE.** Where orders for work to be done are made by a local authority under statutory authority, it is usually necessary for the requirements of the local authority to be stated with some particularity, but in the present case it is held that the matter is one for an order in general terms. In fact, the Act itself allows the owner to elect how he will deal with the ruinous or dilapidated building so that it may no longer be a detriment to the amenities of the neighbourhood. D

AS TO DILAPIDATED STRUCTURES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 352-354, paras. 696, 697 ; and FOR CASE, see DIGEST, Vol. 38, p. 209, No. 436.] E

APPLICATION to show cause why a writ of *certiorari* should not issue directed to the recorder of Bolton to remove and quash a certain order of general quarter sessions for the borough of Bolton, dated May 7, 1938, confirming an order made by the justices for the county borough of Bolton, dated Dec. 16, 1937, under the Public Health Act, 1936, s. 58, upon one Millar Johnstone McVittie, being the owner of a certain structure situate in Tonge Moor Road, formerly known as Tonge Picturedrome. The facts are fully set out in the judgment. F

W. Gorman, K.C., and W. G. Morris against the rule. G

R. M. Montgomery, K.C., and J. W. Stansfield in support of the rule.

LORD HEWART, L.C.J. : This is an order *nisi* for a writ of *certiorari* directed to the recorder of Bolton for the purpose of removing and quashing an order of general quarter sessions for Bolton, dated May 7, 1938, confirming an order made by the justices for the county borough of Bolton on Dec. 16, 1937, whereby, under the Public Health Act, 1936, s. 58, Millar Johnstone McVittie : H

... being the owner of a certain structure situate in Tonge Moor Road in the county borough aforesaid formerly known as Tonge Picturedrome was ordered to

execute such works of repair or restoration or if he so elected to take such steps by demolishing the structure and removing any rubbish resulting from the demolition as may be necessary for remedying the cause of complaint.

A series of grounds is set out, but, in the course of the argument which has taken place, it transpired that only one of those grounds is relied upon now, namely :

A That the said order was defective and bad in law in that it purported to confirm an order made Dec. 16, 1937, by the court of summary jurisdiction for the county borough of Bolton which last-mentioned order did not specify the works of restoration or repair to be executed and/or things to be done for the remedy of the cause of complaint.

It seems to me, and I think that the argument has clearly shown, that

B this application for a writ of *certiorari* depends upon a real misconception. It depends upon a confusion between the provisions in one part of the Public Health Act, 1936, and totally different provisions, set out in a different part of the statute, and relating to an essentially different matter.

C In other words, the argument in support of the rule proceeds upon the view that the Public Health Act, 1936, s. 58, is to be read as if it were a series of sections, not dealing with the subject-matter with which it in fact deals, but dealing with a wholly different subject-matter—namely, the abatement of a nuisance. There is not a word in sect. 58 about the abatement of a nuisance. There is not a word which suggests

D that a detailed notice is to be given to the defendant in the proceedings. The section is not, perhaps, drawn in a way which makes the meaning entirely clear, but, on the other hand, it is clear enough to enable one to abstract its real meaning from it. The important part of the section, for present purposes, is as follows :

E (1) If it appears to a local authority that any building or structure, or part of a building or structure . . . (b) is by reason of its ruinous or dilapidated condition seriously detrimental to the amenities of the neighbourhood, the authority may apply to a court of summary jurisdiction, and the court may . . . (ii) . . . make an order requiring the owner of the building or structure to execute such works of repair or restoration or, if he so elects, to take such steps by demolishing the building or structure or any part thereof and removing any rubbish resulting from the demolition, as may be necessary for remedying the cause of complaint.

F It seems to me that there is a real difference in kind between what is being dealt with there and the provisions to be found elsewhere in another part of the statute about the abatement of a nuisance. Here the statute is dealing with dangerous or dilapidated buildings and structures, and, in my opinion, it deliberately gives an alternative to the owner of such a building or structure, and deliberately refrains from tying the hands of the authority upon whose motion the proceedings started.

G We have seen from the photographs the kind of structure which, after the fire took place some 8 or 9 years ago, is all that remains of this building. It is really a piece of ruin or wreckage, consisting, so far as one can see, of some remnant of the foundation and some upright metal posts extending into the air, not connected with each other and not attached to anything but the ground itself.

H The alternatives which are offered by this section in the case of this kind of structure, which is a dangerous or dilapidated building or

structure, are these. The order may require the owner of the building or structure to execute such works of repair or restoration as may be necessary for remedying the cause of complaint—the cause of complaint being that here is a dangerous and dilapidated structure—or, if the owner so elects, to take such steps, by demolishing the building or structure or any part thereof and removing any rubbish resulting from the demolition, as may be necessary for remedying the cause of complaint. A

It is quite true that that section refrains from the particularity required where a different kind of subject-matter is being dealt with, because the authority is not to be saddled with the duty of stating what particular course is to be taken, or, to put it in another way, because the owner or occupier is given the opportunity, of reconstructing the structure which has been found to be dangerous and dilapidated and seriously detrimental to the amenities of the neighbourhood. B
The justices have not said what he is to do. The proper course is that he should make that which is dangerous and dilapidated no longer dangerous and dilapidated. No such burden is put upon the local authority as saying what course is to be followed. It seems that the reason for not putting it upon the local authority is that the matter is sufficiently obvious. C
When one looks at these pictures of all that remains of this burnt-out cinema, one is impelled to ask how the local authority, or how a body of justices, could usefully and properly dictate to the owner of what is left of this structure what he can do to bring the structure into conformity with the amenities of the neighbourhood. D
As has been said by counsel for Mr. McVittie, numerous different ways of dealing with the matter have occurred to his mind. Be it so. By E
what arbitrary test, then, is the court of summary jurisdiction, or the local authority, to say not only whether they prefer this way of dealing with the matter, but also that they order that McVittie shall deal with the matter in that way, or, alternatively, demolish it? F
It seems to me that no useful purpose is served by reading into a part of sect. 58 quite different provisions enacted for quite a different purpose—namely, provisions relating to the abatement of a nuisance. It is to be observed by way of supplement that sect. 58 (2), I think, throws light on the interpretation of sect. 58 (1). G
Sect. 58 (2) provides as follows :

If the person on whom an order is made under subsect. (1) of this section for the execution of works, or the demolition of a building or structure or of any part of a building or structure, and the removal of any rubbish resulting from the demolition, fails to comply with the order within the time therein specified, the local authority may execute the order in such manner as they think fit and may recover the expenses reasonably incurred by them in so doing from the person in default, and without prejudice to the right of the authority to exercise those powers, he shall be liable to a fine not exceeding £10. H

In my opinion, there is no more ground for the contention on the facts of this case than there was, on behalf of the recorder of Bolton, any usurpation or excess of jurisdiction which calls for the issue of a writ of *certiorari*. He seems to have taken a proper course, and to have observed

faithfully the provisions of the statute. I think, therefore, that this rule ought to be discharged.

MACNAGHTEN, J. : I am of the same opinion, and have but little that I desire to add. I wish to point out that the cause of complaint under the Public Health Act, 1936, s. 58, is that the ruinous or dilapidated condition of the building or structure in question is seriously detrimental to the amenities of the neighbourhood in which it is situated. No one has so far at any stage questioned that what remains of the burnt-out cinema of Mr. McVittie—the score or so of iron girders and stanchions pointing to the sky—is seriously detrimental to the amenities of the county borough of Bolton. Looking at the photographs, I think that it is obviously a disgrace to the county borough and a disgrace to the owner of the land that such an eyesore should be left in that condition to be seen from the road. The remedy which Parliament has at last provided for such a state of things provides that the court may make an order requiring the owner of the building or structure to execute works of restoration or, if he so elects, to take such steps, by demolishing the structure and removing any rubbish resulting from the demolition, as may be necessary for remedying the cause of complaint. I am not quite clear how, in the case of a ruin such as this, work of restoration could be done. These iron girders are all that is left of the cinema. It is not necessary for the justices of Bolton to order him to restore the cinema. What he has to do is to make it so that it is no longer an eyesore to the people of Bolton, and that, of course, he may do in a great many ways. The simplest way, no doubt, is for him to take down these girders. He might, however, be minded to turn them, or he could actually turn them, into a picturesque ruin so that they would be no longer detrimental to the amenities of the county borough of Bolton, or he might conceal them so that they could not be seen from any public place. All those are matters with regard to which he can do as he pleases so long as he does not keep his property in such a disgraceful condition that it is seriously detrimental to the amenities, and, if it is detrimental to the amenities, I suppose that it is detrimental also to the landlords, of the properties round about. I think that this application for a rule should be discharged.

SINGLETON, J. : I agree. This question has no doubt existed for some time. That which was the Tonge Picturedrome was damaged by a fire which occurred, we are told, in 1930. The condition of the structure—if that is the proper description of it—is shown by several photographs which are attached to the case. Complaint was made on Dec. 6, 1937. That complaint was heard by the justices on Dec. 16, 1937, and they made an order which was upheld by the recorder of Bolton, who found that, by reason of its ruinous condition, the structure was seriously detrimental to the amenities of the neighbourhood. The recorder upheld the order of the justices, which was within the terms of the Public Health Act, 1936, s. 58, which this court also upholds.

The result of the decision of this court is that that position, which has existed so long, will shortly cease to exist.

Rule discharged, with costs.

Solicitors: *Simmons & Simmons*, agents for *P. S. Rennison*, Town Clerk, Bolton (against the rule); *Peacock & Goddard*, agents for *Percy H. Barker & Co.*, Manchester (in support of the rule).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

Re A DEBTOR (No. 23 OF 1939), DEBTOR v. PETITIONING CREDITOR AND OFFICIAL RECEIVER.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Goddard, L.JJ.), **March 17, 20, 31, 1939.**]

Bankruptcy—Petition—Estoppel—Deed of arrangement—Trading with trustee—Earlier unconnected act of bankruptcy—Amendment of petition—Signature by partnership—Bankruptcy Act, 1914 (c. 59), ss. 5 (3), 109 (2)—Bankruptcy Rules, 1915, rr. 278, 385.

On Jan. 6, 1939, the debtor gave notice to the petitioning creditors that he was about to suspend payment of his debts, but said nothing about any intention of executing a deed of assignment, nor, in fact, had he then any such intention. On Jan. 9, the debtor, at the suggestion of the trustee thereof, executed a deed of assignment. At a meeting of creditors, a resolution empowering the trustee to act under the deed was passed by a majority. The petitioning creditors did not vote on the resolution, and, later, moved a resolution in favour of bankruptcy proceedings which was not carried. They then filed a petition based upon the notice of suspension of payment on Jan. 6. The petitioning creditors later received orders for goods from the trustee, and executed the same and received payment for the goods so supplied. The petition was signed in the firm's name by a partner, and, at the hearing, the registrar allowed an amendment whereby the signature of one partner was inserted:—

HELD: (i) the amendment of the petition was properly allowed.

(ii) the conduct of the petitioning creditors prevented them from relying upon the execution of the deed of assignment as an act of bankruptcy, although it did not amount to an assent to the deed.

(iii) any acts done in reference to the deed could not estop the petitioning creditors from relying upon the earlier act of bankruptcy.

(iv) the notice of suspension had no connection with the subsequent execution of the deed of assignment and could, therefore, be relied upon as a separate act of bankruptcy.

[EDITORIAL NOTE.] Their Lordships here distinguish three things: (a) an assent by a creditor to a deed of assignment, (b) conduct in relation to a deed of assignment which will prevent the creditor relying upon it as an act of bankruptcy and (c) a prior act of bankruptcy unconnected with the deed of assignment and the acts of the creditor under it and which, it is held, may be relied upon despite the execution of the deed and a recognition of it by the creditor. So long as the prior act can be shown to be quite unconnected with the deed it is a good act of bankruptcy upon which a petition may be founded. The case is important, too, by reason of the careful distinction drawn between conduct amounting to an assent to a deed of assignment and conduct preventing the creditor from relying upon its execution as an act of bankruptcy.

AS TO ASSENT TO DEED OF ARRANGEMENT AND ACT OF BANKRUPTCY, see

HALSBURY, Hailsham Edn., Vol. 2, pp. 18-20, para. 26; and FOR CASES, see DIGEST, Vol. 4, pp. 126-131, Nos. 1149-1199.]

Cases referred to:

- (1) *Re Stray, Ex p. Stray* (1867), 2 Ch. App. 374; 4 Digest 128, 1178; 36 L.J.Bey. 7; 16 L.T. 250.
 - (2) *Re Brindley, Ex p. Taylor, Sons & Co.*, [1906] 1 K.B. 377; 4 Digest 129, 1182; 75 L.J.K.B. 46.
 - (3) *Re Hawley, Ex p. Ridgway* (1897), 76 L.T. 501; 4 Digest 128, 1177.
 - (4) *Re Woodroff, Ex p. Woodroff* (1897), 76 L.T. 502; 4 Mans. 46; 4 Digest 129, 1181.
 - (5) *Re Sunderland*, [1911] 2 K.B. 658; 4 Digest 128, 1179; 105 L.T. 233.
 - (6) *Re Jones Brothers, Ex p. Associated Newspapers, Ltd.*, [1912] 3 K.B. 234; 4 Digest 129, 1187; 81 L.J.K.B. 1178.
 - (7) *Re A Debtor (No. 382 of 1938), Ex parte Debtor v. Petitioning Creditors and Official Receiver*, [1939] Ch. 145; [1938] 3 All E.R. 744; Digest Supp.; 107 L.J.Ch. 310; 159 L.T. 377.
 - (8) *Weston (Victor) (Fabrics), Ltd. v. Morgensterns*, [1937] 3 All E.R. 769; Digest Supp.; affg. [1937] 2 All E.R. 260.
 - (9) *Re Woodhouse, Ex p. Morgan* (1863), 1 De G. J. & Sm. 288; 5 Digest 1074, 8794; 32 L.J.Bey. 15; 7 L.T. 729.
 - (10) *Re Mills, Ex p. Mills*, [1906] 1 K.B. 389; 4 Digest 127, 1167; 94 L.T. 41.
 - (11) *Re Debtor (No. 5 of 1936)*, [1936] Ch. 728; Digest Supp.; 105 L.J.Ch. 375.
 - (12) *Brogden v. Metropolitan Ry. Co.* (1877), 2 App. Cas. 666; 12 Digest 52, 289.
 - (13) *Re Debtor (No. 11 of 1935)*, [1936] Ch. 165; Digest Supp.; 105 L.J.Ch. 146; 154 L.T. 397.
- D** APPEAL from a receiving order made by Mr. Registrar STIEBEL, dated Feb. 7, 1939. The facts are fully set out in the judgment of the court delivered by SIR WILFRID GREENE, M.R.
- A. T. Denning, K.C.*, and *Neil Lawson* for the appellant.
- V. R. Aronson* for the respondents.
- E** *Denning, K.C.*: When a petition is presented by a firm, it must be signed by a partner, and it is not validly presented unless it is so signed. The mere writing of the firm name would not be sufficient to meet the requirements of the rules. The amendment of the petition should not have been allowed. There was an assent to the deed of assignment by
- F** what happened, and the right of the petitioning creditors to present a petition has gone. If a creditor takes a privilege under the deed, he thereby accepts the deed as valid. He also waives any reliance upon any other earlier act of bankruptcy. If that proposition is too wide, he waives, not only the deed as an act of bankruptcy, but also all letters
- G** and circulars leading up to it. A party who does business with the trustee affirms the deed. The trustee is entitled to carry on the business only *qua* trustee, and, if a creditor does business with the trustee, the creditor is not entitled to impugn the deed. There is a clear waiver of any reliance upon any act of bankruptcy prior to the deed. A man
- H** cannot take a benefit under a deed and then go behind it and rely upon an act of bankruptcy. The conduct of the petitioning creditor in the present case is similar to that of the petitioning creditor in *Re A Debtor (No. 382 of 1938)*, *Debtor v. Petitioning Creditor and Official Receiver* (7). In *Victor Weston (Fabrics), Ltd. v. Morgensterns* (8), it was said by FINLAY, J., that, when a creditor, although he does not send in a state-

ment of account, deals with a trustee, it is reasonable to infer an estoppel. The common law doctrine of election is the ratio which really applies to this case. By accepting the orders and accepting payment for the goods supplied, the petitioning creditor waived all acts of bankruptcy of which, he was aware at the time. [Counsel referred to *Re Woodhouse, Ex p. Morgan* (9), *Re Stray, Ex p. Stray* (1), *Re Hawley, Ex p. Ridgway* (3), *Re Woodroff, Ex p. Woodroff* (4), *Re Brindley, Ex p. Taylor, Sons & Co.* (2), *Re Mills, Ex p. Mills* (10), *Re Sunderland* (5), *Re Jones Brothers, Ex p. Associated Newspapers, Ltd.* (6), *Re A Debtor (No. 5 of 1936)* (11), *Brogden v. Metropolitan Ry. Co.* (12) and *Re A Debtor (No. 11 of 1935)* (13).]

Aronson : The making of the receiving order is a matter of discretion, and the court will not make a receiving order if it appears that there is reason why it should not do so. It is stated for the appellant that a deed cannot be relied upon if a benefit has been taken under it. A different act of bankruptcy, however, can be relied upon, and, by presenting a petition founded on that, the deed can be upset. That a later act of bankruptcy can be relied upon is a matter which is not disputed. In *Re Mills, Ex p. Mills* (10), apparently STIRLING, L.J., contemplates that, although the petitioning creditor may not allege that the deed is a fraud, because of his own conduct, there is nothing to prevent a trustee in bankruptcy from making the allegation. Estoppel may prevent a petitioning creditor from relying on the deed, but he is not prevented from relying upon any other act of bankruptcy. The act of bankruptcy relied upon is not part and parcel of the transactions leading up to the deed of assignment in the sense of the transactions in *Re Hawley, Ex p. Ridgway* (3) and in *Re Woodroff, Ex p. Woodroff* (4). [Counsel referred to *Re Stray, Ex p. Stray* (1) and *Re A Debtor (No. 5 of 1936)* (11).]

Lawson, in reply : The petitioning creditors' conduct, both at the informal meeting of the creditors and at the general meeting, constitutes undoubted acts of privity. If the principle of election is applied, the matter becomes quite clear, and it is easy to say that, if a man becomes a party to a deed which passes the estate, he should be precluded from relying upon all known prior acts of bankruptcy. The trustee has to act at his peril as regards creditors who have not assented to the deed, and, if he has to act at his peril as regards creditors who have had something to do with the deed, his position will be very difficult. There is no difference between reliance on the deed itself and reliance upon acts which are prior to the deed. The doctrine was correctly stated by STIRLING, L.J., in *Re Brindley, Ex p. Taylor, Sons & Co.* (2), at p. 388, when he said that the creditors cannot both approbate and reprobate. In the present case, there is "sufficient cause" within the meaning of sect. 5 (3), and a receiving order should not have been made. [Counsel referred to *Re Sunderland* (5) and *Re Mills, Ex p. Mills* (10).]

The judgment of the court was prepared by SIR WILFRID GREENE, M.R.

SIR WILFRID GREENE, M.R. : The receiving order against which

the debtor is appealing was made upon a petition filed on Jan. 11, 1939. The petitioning creditors are therein described by their individual names, and are stated to be trading in co-partnership under a firm name. The petition as filed was signed by one of the partners in the firm name, and under the signature was written by a clerk the following words :

A by [the partner who had signed], a partner in the said firm.

At the hearing of the petition, Mr. Registrar STIEBEL allowed the petition to be amended by inserting the signature of the partner who had originally signed the petition. As the result of the insertion of this signature, the petition in point of form satisfied the requirements of the Bankruptcy

B Rules, 1915, r. 278.

The first point taken before us on behalf of the debtor was that the registrar ought not to have allowed this amendment. It was said that, at the date of the hearing before him, there was not in existence a bankruptcy petition, and that non-compliance with r. 278—as to signature

C where a firm of creditors are petitioning—was not such an irregularity as could be cured by amendment. In our opinion, this argument cannot be supported. The Bankruptcy Act, 1914, s. 109 (2), and the Bankruptcy Rules, 1915, r. 385, are quite general in their language, and we see no ground for limiting the wide jurisdiction thereby conferred on the court

D so as to exclude an amendment such as that now in question.

The other point taken by the debtor requires more detailed examination. Stated shortly, it is that the petitioning creditors have by their conduct disentitled themselves from relying upon the act of bankruptcy on which the petition is based. The facts relevant to this contention

E are shortly these. The act of bankruptcy alleged in the petition is a notice given to the petitioning creditors on Jan. 6, 1939, that the debtor had suspended, or was about to suspend, payment of his debts. After hearing oral evidence, the registrar accepted the petitioning creditors' evidence as to what took place on that occasion, and that the debtor

F then stated that he was insolvent and could not pay his debts. One of the partners had called at the debtor's place of business in order to inquire about an outstanding account, and, in addition to his statement of insolvency, the debtor said that he proposed calling a meeting of his creditors for the purpose of informing them of his position. No mention was

G made of any intention by the debtor to execute a deed of assignment, and it is clear from the debtor's own statement (para. 9 of his affidavit sworn on Jan. 26, 1939), and from that of the trustee under the deed which was subsequently executed (para. 2 of his affidavit sworn on Jan. 31, 1939), that the suggestion of a deed of assignment was made

H for the first time by the trustee on Jan. 9. The declaration of insolvency made on Jan. 6 was not, therefore, in fact made with reference to, or in contemplation of, the execution of a deed of assignment. The deed of assignment was executed on Jan. 9, 1939, and was expressed to be made between the debtor, the trustee and the creditors who should execute or assent in writing to the deed. It contained an assignment by the

debtor of the whole of his property (with the usual exceptions) to the trustee, and the usual provisions for realisation and payment of the creditors executing or assenting in writing to the deed. It also contained power to the trustee to carry on the business of the debtor and to employ the trust property for that purpose, with the usual subsidiary powers.

On Jan. 10, 1939, the trustee sent a circular to all the creditors informing them of the execution of the deed, stating that a meeting of creditors would be called expeditiously, asking for a statement of account, and asking the creditors to execute any orders for goods required for the business which should be given on the trustee's own signed order forms. On Jan. 10, the trustee sent to the petitioning creditors an order (marked "Urgent") for three sets of furniture. The order was on the debtor's business form, and was signed by the trustee, the word "Trustee" being stamped below the signature. One of these three sets of furniture was delivered on Jan. 10, and the other two sets were delivered on Jan. 13. On Jan. 11, the petitioning creditors, having heard that a private meeting of the principal creditors had been called by the trustee for Jan. 12, asked the trustee if they might attend. He agreed, and one of the partners attended with the firm's solicitor, who had with him the petition which had been filed on the previous day. The petition was served at, or immediately after, the meeting, which was adjourned to Jan. 17. At the adjourned meeting, the creditors present, without dissent from the petitioning creditors, agreed to leave the carrying on of the business in the hands of the trustee pending a full meeting of creditors, which was to be called for Jan. 24. The notice of this meeting was sent out to the creditors on Jan. 19, and on the same day the trustee sent to the petitioning creditors a second order for furniture. This order was in a form similar to that of the first order, except that it had stamped upon it the name of the trustee with the words "Trustee under a deed of assignment" below it. This furniture was delivered by the petitioning creditors to the trustee on Jan. 21. On Jan. 24, the trustee sent a cheque to the petitioning creditors as payment for the furniture comprised in the first order, an account for which had been sent in by them to the trustee's firm. At the meeting of creditors on Jan. 24, a statement of affairs was produced by the trustee and discussed by those present, including the petitioning creditors. A resolution approving the appointment of the trustee to act under the deed was passed by a majority. The petitioning creditors did not vote on this resolution, but later moved a resolution in favour of bankruptcy proceedings, which was not carried. On Jan. 31, the trustee sent a cheque to the petitioning creditors as payment for the furniture comprised in the second order, an account for which had been sent in by them to the trustee's firm.

In the circumstances which we have described, it would, in our opinion, have been quite impossible for the petitioning creditors to rely upon the execution of the deed of assignment as an act of bankruptcy. A long

- series of authorities, of which *Re Stray, Ex p. Stray* (1) is a leading example, establishes and illustrates the rule that a creditor who has assented to, or recognised, a deed of assignment cannot rely on that deed as an act of bankruptcy. What action on the part of a creditor will amount to such assent or recognition must, of course, depend upon the facts of the individual case. In the present case, the acceptance of the orders from the trustee and the receipt of payment for those orders from him with full knowledge that he was acting as trustee under the deed were, in our opinion, according to the decision of this court in *Re Brindley, Ex p. Taylor, Sons & Co.* (2), by themselves sufficient acts of recognition. The act of bankruptcy upon which the petitioning creditors here rely, however, is not the execution of the deed, but the notice of suspension given on Jan. 6. Counsel for the debtor endeavoured to meet this objection in one or other of three alternative ways. His first argument was that the acts of the petitioning creditors did not merely amount to a recognition of the deed of assignment, but had the effect of binding them to it as though they had executed it or assented to it in writing. We cannot accept this argument. The distinction between conduct which precludes a creditor from relying on a deed of assignment as an act of bankruptcy and conduct which amounts to an assent binding him to its provisions has long been recognised in these cases: see, for example, *Re Stray, Ex p. Stray* (1). Without pausing to consider whether or not anything short of execution of this deed, or a written assent to it, could in any circumstances have bound a creditor, we are clearly of opinion that no binding assent can be found in the present case.
- The second argument was that the rule in *Re Stray, Ex p. Stray* (1) prevents the creditor from relying, not merely upon the deed itself, but also upon an earlier act of bankruptcy entirely unconnected with the deed. This argument also we are unable to accept. It has been laid down in a number of cases that the rule is based on estoppel and prevents the creditor concerned from alleging that the execution of the deed was a fraudulent act: see, for example, *Re Stray, Ex p. Stray* (1), at pp. 378, 381, *per* LORD CAIRNS, L.J., *Re Hawley, Ex p. Ridgway* (3) and *Re Brindley, Ex p. Taylor, Sons & Co.* (2), at p. 387, *per* VAUGHAN WILLIAMS, L.J. It would be contrary to all principle to hold that acts done in relation to one matter, and one only—namely, the deed—estop the creditor from asserting the true facts in relation to a totally distinct and unconnected matter. In other words, the estoppel cannot operate beyond the particular matter to which the words or conduct which give rise to it relate. This distinction was clearly pointed out by VAUGHAN WILLIAMS, L.J., in *Re Woodroff, Ex p. Woodroff* (4), at p. 49:

It was said by Mr. Mackenzie that we cannot decide this without holding that if you have acquiesced in a deed that you acquiesce in every act of bankruptcy committed by the debtor before or after the deed, and that the debtor, as between such creditor and himself, is purged from the effect of those acts of bankruptcy. I do not assent to anything of the sort; we do not mean to decide anything of the sort. If there had been any independent act of bankruptcy here, as, for example, suffering

an execution, I see no reason why the creditor, however much he was privy to the deed, should not base a petition upon such act of bankruptcy.

Reliance was placed on *Re Sunderland* (5), where the act of bankruptcy on which the petition was based was in fact subsequent to the recognition of the deed by the petitioning creditor, and it was suggested that the language there used by implication meant that an act of bankruptcy earlier than the recognition could not be relied on. We cannot so read the judgments in that case. The point was not before the court, and the expressions used in the judgments were directed to the facts of the particular case. A

The last argument was that the notice of suspension ought to be treated as forming part of the same transaction as the deed of assignment itself. It is well settled that a creditor who is precluded from relying upon a deed of assignment cannot rely upon, for example, circulars convening a meeting called to decide question whether or not a deed of assignment should be executed by the debtor: see, for example, *Re Hawley, Ex p. Ridgway* (3) and *Re Woodroff, Ex p. Woodroff* (4). The law is thus stated by PHILLIMORE, J., in *Re Jones Brothers, Ex p. Associated Newspapers, Ltd.* (6), at p. 239: B C

...circulars and statements leading up to or connected with the execution of a deed of assignment cannot be relied upon as independent acts of bankruptcy by persons who have assented to the deed itself and are consequently estopped from relying on the deed itself as an act of bankruptcy. D

This is logical. In the present case, however, the argument breaks down on the facts. The notice of suspension given on Jan. 6 to one particular creditor has nothing to do with the act of bankruptcy constituted by the execution of the deed, and stands on quite a different footing from such notices as were considered in the cases referred to above. It was not given in contemplation of the execution of the deed at all, since at that time there was no intention even to consider the execution of a deed of assignment. The suggestion of executing such a deed came from the trustee 3 days later. The decision of the registrar was right on both points, and the appeal must be dismissed with costs. E F

Appeal dismissed with costs.

Solicitors: *Judge, Hackman & Judge* (for the appellant); *Matthew Trackman & Co.* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.] G

UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY v. PICKARD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), March 8, 9, 10, 13, 14, 15, 16, 1939.] H

Master and Servant—Liability of master for tort of servant—Fraud involving forgery—Ostensible authority.

A solicitor's managing clerk obtained an advance of a sum of £500 upon a mortgage of property by producing to the society's solicitors a fictitious deed. It was not proved that the solicitor's clerk actually

forged the deed, but he must have known that it was a forged document. It was contended that, as the lenders were not clients of the solicitor, the rule in *Lloyd v. Grace, Smith & Co.* (1) did not apply. It was also contended that the solicitor could not be made liable for the fraudulent acts of his clerk where the fraud involved forgery. It was held as a fact that the clerk had ostensible authority for all that he did in the matter :—

- A HELD : so long as the clerk was acting within his ostensible authority, the master was liable, despite the fact that the fraud involved forgery. *Decision of ATKINSON, J.* ([1938] 4 All E.R. 324) *affirmed*.

[EDITORIAL NOTE.] It was argued that this case was outside the principle of *Lloyd v. Grace, Smith & Co.* (1). Two main reasons for this contention were advanced. First it was said that the servant had embarked on a frolic of his own, and an analogy was sought to be drawn between this and a well-known class of accident case. Then it was sought to base the argument upon a passage in the judgment of WRIGHT, J., as he then was, in *Slingsby's* case (6) in which it was suggested that an act of forgery was outside any actual or ostensible authority. This contention was rejected by the Court of Appeal, as it was by ATKINSON, J., in the lower court.

C AS TO PRINCIPAL'S LIABILITY FOR WRONGFUL ACT NOT EXPRESSLY AUTHORISED, see HALSBURY, Hailsham Edn., Vol. 1, pp. 285-287, para. 471; and FOR CASES, see DIGEST, Vol. 1, pp. 594-604, Nos. 2282-2340.]

Cases referred to :

- D (1) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716; 1 Digest 595, 2284; 81 L.J.K.B. 1140; 107 L.T. 531.
- (2) *British Mutual Bank Co., Ltd. v. Charnwood Forest Ry. Co.* (1887), 18 Q.B.D. 714; 1 Digest 591, 2267; 56 L.J.Q.B. 449; 57 L.T. 833.
- (3) *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 1 Digest 587, 2245; 36 L.J.Ex. 147; 16 L.T. 461.
- E (4) *Ruben & Ladenburg v. Great Fingall Consolidated*, [1906] A.C. 439; 1 Digest 592, 2268; 75 L.J.K.B. 843; 95 L.T. 214.
- (5) *Kreditbank Cassel G.m.b.H. v. Schenkers*, [1927] 1 K.B. 826; Digest Supp.; 96 L.J.K.B. 501; 136 L.T. 716.
- (6) *Slingsby v. District Bank, Ltd.*, [1931] 2 K.B. 588; *affd.*, [1932] 1 K.B. 544; Digest Supp.; 101 L.J.K.B. 281; 146 L.T. 377.
- F (7) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; 9 Digest 97, 406; 25 L.J.Q.B. 317.
- (8) *Mahony v. East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 9 Digest 642, 4239; 33 L.T. 383.
- (9) *Grant v. Norway* (1851), 10 C.B. 665; 41 Digest 255, 966; 20 L.J.C.P. 93; 16 L.T.O.S. 504.
- G (10) *Goh Choon Seng v. Lee Kim Soo*, [1925] A.C. 550; 34 Digest 138, 1079; 94 L.J.P.C. 129; 133 L.T. 65.
- (11) *Rand v. Craig*, [1919] 1 Ch. 1; 34 Digest 128, 983; *sub nom. Rank (Joseph), Ltd. v. Craig*, 88 L.J.Ch. 45; 119 L.T. 751.
- (12) *Swire v. Francis* (1877), 3 App. Cas. 106; 1 Digest 596, 2290; 47 L.J.P.C. 18; 37 L.T. 554.
- H (13) *Bargate v. Shortridge* (1855), 5 H.L. Cas. 297; 9 Digest 373, 2378; 24 L.J.Ch. 457; 25 L.T.O.S. 204; *affg. S.C. sub nom. Shortridge v. Bosanquet* (1852), 16 Beav. 84.
- (14) *D'Arcy v. Tamar, Kit Hill & Callington Ry. Co.* (1866), L.R. 2 Exch. 158; 13 Digest 286, 174; 36 L.J.Ex. 37; 14 L.T. 626.

APPEAL from a judgment of ATKINSON, J., dated Nov. 8, 1938, and reported [1938] 4 All E.R. 324, where the facts are fully set out.

John Morris, K.C., and *C. A. Collingwood* for the appellant.
B. B. Stenham and *Frank Whitworth* for the respondents.

Morris, K.C.: The building society sued the appellant, a solicitor, for damages for fraudulent representation. The fraudulent representation, however, was by the managing clerk, for a private purpose of his own. The position in the present case is different from that in *Lloyd v. Grace, Smith & Co.* (1). In that case, the plaintiff was a client of the solicitor, whereas in the present case the building society was not a client of the appellant, and no contractual relationship existed between them. There is a broad proposition that an employer is liable for the acts of his employee if the acts are done within the scope of the employment, but there are many limitations to that proposition. The facts of the present case do not bring it within the broad statement of the principle, or, alternatively, they bring it within one of the limitations. A distinction is to be drawn between a person who is engaged upon his master's business and one who is dealing with some business of his own. In the present case, the appellant, by common consent, is free from any complicity. The managing clerk has deceived both his own employer and the building society. The carrying out of all the formalities of the transaction was one of the things the managing clerk was put in the office to do, but not every act done on the employer's premises or with his property can make the employer liable. *Lloyd v. Grace, Smith & Co.* (1) does not cover the present case. What LORD ESHER, M.R., said in *British Mutual Bank Co., Ltd. v. Charnwood Forest Ry. Co.* (2) is good law, and LORD MACNAGHTEN did not dissent from it. Nothing that amounts to wilful wrongdoing is within the scope of the employment. The appellant never authorised the respondents to deal with the managing clerk in the matter. If a man commits forgery for his own benefit, and without any actual or ostensible authority from his employer to act in the matter in question, the principle in *Lloyd v. Grace, Smith & Co.* (1) does not apply. There was no ostensible authority in the present case, as can be seen by the way in which the matter developed. There had been no previous dealings with the respondents. It was said by LORD HATHERLEY in *Mahony v. East Holyford Mining Co.* (8) that it could be assumed, in dealing with a company, that matters had been done properly if they appeared to have been done properly. If the documents were forgeries, the rule in *Mahony's* case (8) would not apply. [Counsel referred to *Barwick v. English Joint Stock Bank* (3), *Goh Choon Seng v. Lee Kim Soo* (10), *Rand v. Craig* (11), *Swire v. Francis* (12), *Ruben & Ladenburg v. Great Fingall Consolidated* (4), *Kreditbank Cassel G.m.b.H. v. Schenkers* (5), *Slingsby v. District Bank, Ltd.* (6), *Bargate v. Shortridge* (13) and *D'Arcy v. Tamar, Kit Hill & Callington Ry. Co.* (14).]

Counsel for the respondents were not called upon.

SIR WILFRID GREENE, M.R.: Mr. Conway, a clerk employed by

Pickard & Co., was guilty of a fraud perpetrated against the respondents in the course of which he uttered one or more forged documents. The question is whether or not Pickard & Co. are in law liable to the respondents for the damage they have suffered by reason of that fraudulent act. ATKINSON, J., held that they were, and I agree with his conclusion.

- A Before us, the argument presented began by endeavouring to establish a distinction between the present case, where the person defrauded was not a client of the firm, and cases such as *Lloyd v. Grace, Smith & Co.* (1), where the person defrauded was a client of the firm. It was said that the principle of *Lloyd v. Grace, Smith & Co.* (1) must be confined to cases
- B where the fraudulent act committed by the servant is committed in the course of doing a thing which is in truth the employer's business. By that I mean this. In *Lloyd v. Grace, Smith & Co.* (1), it was said, it was the employer's business to conduct conveyancing transactions for clients, and in the course of conducting such a transaction for a
- C client the clerk was guilty of a fraud. In the present case, it is said that no client was involved in this fraud, or suffered by the fraud, and that, therefore, there is a valid distinction between the present case and *Lloyd v. Grace, Smith & Co.* (1). I am unable to understand on what principle that can be so. The managing clerk, put in charge of
- D that office, as he was, was unquestionably given in fact full authority to conduct the business of a solicitor's office on behalf of, and in the name of, his principal. That authority would cover, not merely acting for clients, but also carrying through all transactions which would normally be carried through by a solicitor—namely, completion of conveyancing
- E business with third parties, dealings with clients, and the obtaining from such third parties, upon completion of the transaction, of sums of money, and the giving of receipts therefor. With regard to that
- F part of the office activities, there is no question of the relationship of solicitor and client between the solicitor and the third party. Nevertheless, the authority of a clerk occupying the position of the principal to deal with third parties in circumstances where the third parties are going to change their position as the result of the transaction in progress, or which appears to be in progress, cannot be denied. Accordingly, I cannot see how the principle of *Lloyd v. Grace, Smith & Co.* (1) can be
- G confined to the narrow case where the authority which the clerk is purporting to exercise is an authority to treat with a client. It seems to me that it must extend to cases where the authority which the clerk purports to exercise, and which, upon the face of it, has been given to him, is one which involves leading third parties to change their position on the
- H faith that the business which brings them into contact with the firm is genuine business. That is exactly what happened in the present case. The initial approach to the building society was a thing which was within the scope, or, had it been a genuine approach, would have been within the actual authority, of Mr. Conway, and every step in the proceedings down to the delivery of the documents which took place, the answering

of requisitions, the approving of the draft mortgage, the attendance at completion and the receiving, and giving of a receipt for, the money advanced, had they been taken within the course of a genuine transaction, would have been within the authority of Mr. Conway. When a person is put in that position, his actual authority and his ostensible authority are, in one sense, the same, because the ostensible authority of a solicitor's clerk put in such a position coincides with the actual authority which he is given. The ostensible authority, however, may go a little further, for the reason that it is not within his actual authority to commit a fraud. Nevertheless, it is within his ostensible authority to perform acts of the class I have mentioned. So long as he is acting within the scope of that class of act, his employer is bound, whether the clerk is acting for his own purposes or for those of his employer.

Mr. Morris, regarding the matter from a different angle, wished to draw a comparison, for the purpose of supporting the same thesis, between the present case and the case of servants who, to use the well-known phrase, are engaged on a frolic of their own. Here, he says, Mr. Conway never began to act for his employer. From the very beginning, he started on something which was a pure excursion of his own. Nobody who was a client of the firm, or had any contractual or other relations with it, was concerned in the transaction from beginning to end. The whole thing must be treated as a purely extraneous matter, with which the firm has no concern at all, just the same as the case of a driver of a motor car or motor van who takes it off on a frolic of his own and negligently injures somebody. With all respect to that argument, I cannot accept it. It appears to me to be drawing an analogy where no analogy exists, because, in the case of the servant who goes off on a frolic of his own, no question arises of any actual or ostensible authority upon the faith of which some third person is going to change his position. The very essence of the present case is that the actual authority and the ostensible authority to Conway were of a kind which, in the ordinary course of an everyday transaction, was going to lead to third persons, on the faith of it, changing their position, just as a purchaser from an apparent client or a mortgagee lending money to a client is going to change his position by being brought into contact with that client. That is within the actual and ostensible authority of the clerk. It is totally different in the case of a servant driving a motor car, or in cases of that kind, where there is no question of the action of third parties being affected in the least degree by any apparent authority on the part of the servant. In support of the argument, Mr. Morris examined a number of cases. I do not propose to do more than refer to the one on which he most particularly relied on this branch of the argument, and that was *British Mutual Bank Co., Ltd. v. Charnwood Forest Ry. Co. (2)*, where, at p. 717, BOWEN, L.J., adopted the words of WILLES, J., in *Barwick v. English Joint Stock Bank (3)*, at p. 265 :

The general rule is, that the master is answerable for every such wrong of the

servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.

- It was for long thought that the words "for the master's benefit" were a correct statement of the law, and involved placing upon the liability of principals a very close limitation. That observation upon which
- A BOWEN, L.J., founded the reasoning of his judgment was expressly disapproved in *Lloyd v. Grace, Smith & Co.* (1). Mr. Morris says that that is the only thing which was disapproved in *Lloyd v. Grace, Smith & Co.* (1), and he says in particular that the observations of LORD
- B ESHER, M.R., in *British Mutual Bank Co. v. Charnwood Forest Ry. Co.* (2) were not disapproved. When I look at the judgment of LORD ESHER, M.R., it appears to me that, in so far as its reasoning is based on the same conception (and I must confess that, in reading it, it appears to me that it is based on the same conception as that on which the reasoning of BOWEN, L.J., was based), the judgment of LORD ESHER, M.R., is
- C subject to precisely the same objection as that of BOWEN, L.J. In any event, it appears to me that no sound argument can be based on that case, in view of what was said about it in *Lloyd v. Grace, Smith & Co.* (1), where the most modern statement of the law is to be found. An attempt to distinguish it on the grounds which I have briefly indicated
- D is, in my opinion, unsuccessful. I observe that ATKINSON, J., in his judgment does not refer to that point, although it was argued before him, as appears from the report. I cannot help thinking that that is due to the fact that he thought, as I think, that the argument is quite incapable of support.
- E The next point taken is that, in any event, the documents by means of which this fraud was perpetrated were forgeries. Mr. Morris treats that merely as an illustration of the main principle for which he contended, with which I have already dealt, and he does so, I think, advisedly, for the reason that the present transaction was not merely one
- F of forgery. The uttering of the forged document was one of a series of acts involving fraudulent misrepresentation. Leaving that aside altogether, and dealing merely with the question as to whether or not the well-known principles affecting the authority of agents, and the extent to which their acts will bind their principals, apply in the case
- G of a forged document, and taking that by itself, I find myself in entire agreement with the view taken by ATKINSON, J. *Ruben & Ladenburg v. Great Fingall Consolidated* (4), *Kreditbank Cassel G.m.b.H. v. Schenkers* (5) and *Slingsby v. District Bank, Ltd.* (6) (one of them in the House of Lords and the other two in this court) appear to me to make it
- H quite clear that, in the view of the judges who dealt with the matter, the question of the effect of a forged instrument as affecting the principal falls within the question of ostensible authority. I can find no justification in any of the observations in those cases for the suggestion that a forgery, if in other respects it comes within the scope of ostensible authority, in any way prevents that doctrine from applying. It is only

in the observations of WRIGHT, J., as he then was, in *Slingsby's* case (6) that any note of doubt on that matter appears. That doubt is dealt with by ATKINSON, J., at p. 329, and I agree with what he has to say about it. All I wish to say in passing is that, if the observations of WRIGHT, J., as he then was, are to be construed in the way in which the appellants here wish us to construe them, it seems to me, if I may say so with great A respect, that the distinction which he draws in the case of forgery seems to be based on the distinction drawn between forgery and the cases which fall under the well-known principle embodied in *Royal British Bank v. Turquand* (7) or in the well-known case of *Mahony v. East Holyford Mining Co.* (8). Those are cases which apply to limited companies, B where rather special rules have been developed. In the case of a limited company, the actual authority of an agent is of necessity subscribed by the constituent documents under which the company has its existence and from which it derives its power, which a person dealing with the company is assumed to know. The internal management and everyday C internal administration of the company are things which an outsider cannot be expected to know by the light of nature, or by inspecting some file, as he can with public documents, like memoranda and articles of association. In order to ascertain things of that kind, he would have to make detailed inquiries inside the company's office. It is quite obvious D that the business of limited companies could never be carried on if everybody dealing with a company was at his peril bound to ascertain whether or not the internal administration of the company had been regularly conducted. It is, I think, rather for reasons of that kind, and not by reference to the law of principal and agent, that that particular E rule came into existence. However that may be, so far as I know, the rule has never been joined up with the other rule of principal and agent in the way in which WRIGHT, J., apparently did it. In any case, the rule in the matter of companies under the principle of *Royal British Bank v. Turquand* (7) has always—certainly ever since the days of LORD F HATHERLEY—been held not to apply to cases of fraud. That is the principle applied in the case of forgery. I can see no justification for applying the reasoning of those cases by analogy to the ordinary cases of principal and agent. For those reasons, and restating in my own language what ATKINSON, J., has said, I express my entire agreement G with his judgment on this point. The appeal must, in consequence, be dismissed with costs.

MACKINNON, L.J.: I agree. I think that this case is precisely covered by the decision of the House of Lords in *Lloyd v. Grace, Smith & Co.* (1). There is an apparent divergence at first sight between cases like *Lloyd v. Grace, Smith & Co.* (1), on the one hand, and cases like *Grant v. Norway* (9), on the other. In the latter class, there are the various cases in which the agency of a secretary of a company is involved. The real difference, I think, between those two classes of cases arises H

upon the examination of the express—and, consequently, the ostensible—authority of the agents who are in question. Anyone dealing with the captain of a ship must be taken to know that he has, and can only have, authority to sign a bill of lading for goods which have been in fact shipped, and, therefore, he can have no ostensible authority to sign
 A a bill of lading for goods which have not been shipped. Knowing that limitation of his actual, and therefore, of his ostensible, authority, the third party is put on inquiry to ascertain whether or not the act he is performing is in fact authorised. Similarly, the actual authority, and, therefore, the ostensible authority, of a secretary of a company
 B can only be to sign documents which he is in fact authorised by the directors to sign, and there again the limitation of an ostensible authority puts on inquiry a person dealing with him. In a case like the present, however, or *Lloyd v. Grace, Smith & Co.* (1), the authority of a solicitor's managing clerk to carry through such a piece of business as this is not
 C in fact limited in any such way. There is, therefore, no known limitation of his ostensible authority to carry through a business such as this on behalf of, and with the actual authority of, his employer. That being so, this matter being fully within the ostensible authority of the agent, the employer is bound by it, and, therefore, I think that this appeal
 D fails.

FINLAY, L.J. : Agreeing, as I do, with both the judgments which have just been delivered, I only desire to say for myself that I think the case falls precisely within the authority of *Lloyd v. Grace, Smith & Co.* (1). I agree that the appeal must be dismissed.

E *Appeal dismissed.*

Solicitors : *Hempsons* (for the appellant) ; *Woodbridge & Sons* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

F CAMPBELL v. SHELBOURNE HOTEL, LTD.

[KING'S BENCH DIVISION (Cassels, J.), **March 30, 31, 1939.**]

Inns and Innkeepers—Negligence—Duty to light passages—Reasonable hours—Doorway leading immediately to steep flight of steps.

G The plaintiff was a guest at a hotel in London at which he had previously stayed some 12 or 13 times, though never before had he been given a room on the ground floor. He knew that the lavatory was diagonally across the passage from his room. Arriving back at about 11.20 p.m., he desired to use the lavatory. The passage outside his room was not lighted, but there was a switch there. He crossed the
 H passage, and, by feeling, came to a door. This the plaintiff opened, thinking that it led to the lavatory, but it opened immediately upon a steep flight of steps, down which he fell and suffered injuries :—

HELD : the plaintiff was an invitee, and, in the circumstances, there was a duty upon the defendants to light the passage at all reasonable hours, and in London 11.20 p.m. was a time when guests might reasonably be expected to be using this passage. The plaintiff was, therefore, entitled to damages in respect of the injuries received.

[EDITORIAL NOTE.] The judgment here carefully distinguishes two types of accident which may happen to a guest at a hotel. He may, as here, proceed through a door and come immediately upon a flight of stairs or other opening causing him to fall. On the other hand, he may pass through a door and proceed in the dark for some distance in circumstances which should lead him to think that he has come through the wrong door, or, at any rate, put him upon inquiry. Viewing the matter from another angle, there is a more obvious duty upon an innkeeper to warn his guests, or to light passages, where doors give at once on some dangerous place.

AS TO PERSONAL SAFETY OF GUESTS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 148-150, paras. 206, 207; and FOR CASES, see DIGEST, Vol. 29, pp. 9, 10, Nos. 116-127.]

Cases referred to :

- (1) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650.
- (2) *Wilkinson v. Fairrie* (1862), 1 H. & C. 633; 36 Digest 13, 38; 32 L.J.Ex. 73; 7 L.T. 599.
- (3) *Walker v. Midland Ry. Co.* (1886), 55 L.T. 489; 29 Digest 9, 118.
- (4) *Maclean v. Segar*, [1917] 2 K.B. 325; 29 Digest 9, 120; 86 L.J.K.B. 1113; 117 L.T. 376.
- (5) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K.B. 205; Digest Supp.; 101 L.J.K.B. 679; 147 L.T. 404.
- (6) *Lee v. Luper*, [1936] 3 All E.R. 817; Digest Supp.

ACTION for damages for negligence, or, alternatively, for breach of D warranty whereby it was alleged that the plaintiff suffered damage. The facts are fully set out in the judgment.

A. Aiken Watson for the plaintiff.

Humfrey Edmunds for the defendants.

CASSELS, J. : This case raises a question of considerable importance E both to those who keep hotels and to those who, either upon business or for pleasure, go as paying customers to such hotels. The facts can be stated very shortly. The plaintiff, Mr. Campbell, is a cooper by occupation, and comes from Glasgow. On Apr. 24, 1938, he arrived in London and went F to the defendants' hotel, where he booked a room for the night, proposing to stay there that night, the following day and the following night. It was a hotel which he knew and at which he had stayed some twelve or thirteen times before, but he had never before stayed in a bedroom upon the ground floor, where he was allocated a bedroom on this occasion. G He slept in that bedroom upon the Sunday night, and on the morning of Monday he made his way to the lavatory. That lavatory, according to the plan, and indeed according to his evidence, would be reached by his leaving his bedroom and turning to the right, where a few feet along the passage he would find the lavatory upon his left. He has very frankly H said that he did not take particular notice of every detail of the features on the way to the lavatory, neither did he take particular notice of the nature or formation of the door leading into the lavatory, either as to its style or as to the way it opened, whether inwards or outwards. It was daylight, and he made such use of the lavatory as he desired and then

went about his business. He was out of the hotel during the day, but returned to it at 7 p.m. and had his dinner. Afterwards he went out again, and at 11.20 p.m. that night, at an hour which has been described by Mr. Pritchard, the managing director of the hotel, as a reasonable hour, he returned to the hotel. His way to his bedroom led him from the
A entrance to the hotel through the dining-room, which was dimly lighted, through the doorway of that dining-room into the passage, which was not lighted, and across that passage through the doorway into his bedroom. When he opened the door of his bedroom, he switched on the light. The light in his bedroom was in the middle of the room, and by reason of the
B formation of the doorway of his bedroom—the door itself being somewhat in a recess—the illumination from the centre light of his bedroom threw a light in an oblique direction through his doorway. He desired to go to the lavatory, and this immediately upon his arrival in his bedroom. He knew that the lavatory was on the other side of the passage, or, as
C he put it, diagonally across the passage. There was no light in the passage, which to him was a dark passage. He went across to the other side of this passage, and he came, by feeling, to a door. Thinking that it was the door of the lavatory he had used in the morning, he opened the door, and immediately fell to the basement below. Inside, or through,
D that doorway, there were steps which in formation tapered to the side of the doorway where the door would begin to open, and then turned to the left to a straight, steep stairway which led to the basement. It was down that stairway that he fell. The plaintiff said something in the course of his evidence about falling over some bannister or rail, but there
E seems to have been some confusion on that point on his part. He fell into the basement and was injured. He came back up the stairs down which he had fallen, having put on a light down below, and made his way to the vestibule of the hotel, where he made his complaint to the porter.

By reason of this accident, he suffered damage, for which he seeks
F to recover damages from the defendants, the owners of this hotel. Originally his claim was based upon negligence, but by reason of an amendment of the statement of claim—which I allowed—there has been added, alternatively, a claim for breach of warranty. I do not think that it makes a great deal of difference upon which ground it is that the
G plaintiff bases his claim. The defence which is raised is that the defendants owed no duty to the plaintiff in respect of any of the matters of which he complains, that there was no negligence upon the part of the defendants or their servants, there being a switch in the passage which the plaintiff could have turned on, and a bell and a telephone in his room,
H and, further, that the plaintiff was guilty of negligence himself, and that his negligence was the sole cause of the accident. Further, it is alleged in defence that he accepted the risk, that, when he went through this doorway, he was going somewhere where he had no right to go, and was, therefore, a trespasser, and that on those grounds the defendants are not liable.

The liability of owners of premises to persons who are upon those premises depends, of course, upon the category into which the complaining person falls. If I may cite the words of LORD HAILSHAM, L.C., in *Addie (R.) & Sons (Collieries) v. Dumbreck* (1), at p. 364 :

There are three categories in which persons visiting premises belonging to another person may fall ; they may go (1.) by the invitation, express or implied, of the occupier ; (2.) with the leave and licence of the occupier, and (3.) as trespassers . . . The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe.

It cannot be disputed, and indeed no one has attempted to dispute it, that the plaintiff in this case falls within the first category. He was there upon business. He was in fact a paying customer of the defendants. He was there, therefore, by the invitation, express or implied, of the occupier. In other words, he falls into the first category, and to him the defendants owed the highest duty to take reasonable care that the premises were safe.

That being so, I have to ask myself whether or not there is here evidence which shows that the defendants were guilty of a breach of that duty, and whether or not from that breach of duty flows the damage which the plaintiff has suffered. The evidence shows that at 11.20 p.m. there was no light in this passage. It was a passage which, according to the evidence of Mr. Pritchard, it was reasonable and proper that the plaintiff should use at a reasonable time. I am not disposed to discuss the position which might arise if this accident had happened, shall we say, at 3 a.m. That is not this case. This accident happened at 11.20 p.m. Mr. Pritchard informed me that it was the duty of the night porter to turn out the lights after the guests had returned to the hotel, making allowance for a reasonable time to elapse after they had returned. That is to say, the night porter, if carrying out his duties properly, would not switch off every light immediately he saw the back of the guest retiring through the doorway which led to his bedroom. That being so, this accident has happened to the plaintiff on the very edge of the passage, and, in my view, at a reasonable hour, and when, further, in my view, the plaintiff was entitled to be making use of that passage.

Some cases have been cited to me with which I propose to deal, and the first one, though perhaps not the most important, was *Wilkinson v. Fairrie* (2). That was a very different case from this, because there a carman, the plaintiff, being sent to the defendants' premises to fetch some goods, was directed to go along a passage where he would find the warehouseman. The passage was dark, and in going along it the plaintiff fell down a staircase and was seriously injured. It was held, at p. 633 :

that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase.

In the course of his judgment, POLLOCK, C.B., approving the non-suit at the trial, said, at p. 635 :

We think the nonsuit was perfectly right. I am not aware of any question which could have been left to the jury. It certainly was not the duty of the defendants to light the passage.

- A I should distinguish that case from this by holding that it certainly was the duty of the defendants in this case to light that passage at a reasonable time for the use of invitees or paying customers in the ordinary conduct of their affairs.

- B I was then referred to *Walker v. Midland Ry. Co.* (3), a case, of course, which is always cited in these matters. There the facts were somewhat different. The headnote reads as follows :

The general duty of an innkeeper to take proper care for the safety of his guests does not extend to every room in his house, at all hours of night or day, but must be limited to those places into which guests may be reasonably supposed to be likely to go, in a reasonable belief that they are entitled or invited to do so.

- C In the case of this particular hotel, which was perhaps not an inn, although no point arises upon that, the duty of the hotelkeeper, conducting his hotel for reward and accepting that guests should come to his hotel and pay for their accommodation, I think would be the same. In *Walker v. Midland Ry. Co.* (3), the headnote continues as follows, at p. 489 :

- E A guest in an inn, the property of the respondent company, left his bedroom in the middle of the night to go to a water-closet. There were properly lighted and easily accessible closets in the same corridor, but he went into a dark "service room", the door of which was shut but not locked, and fell down the unguarded well of a lift at the end of the room, and was killed. The "service room" was not lighted or used at night, and visitors had no business there at any time.

In the course of his opinion, the EARL OF SELBORNE, L.C., who was giving their Lordships' opinion, said, at pp. 489-490 :

- F On opening the door it was apparent that the room was absolutely dark, and it must have been at once perceived that the drip of water came from the place where the sink was, which the deceased left behind him as he advanced into the room. He nevertheless, instead of continuing his search along the corridor for a water-closet properly lighted (which he would have found within a very short distance if he had done so), went into this dark room. It contained one or more tables, on the same side as the sink, and some luggage was lying on the floor ; but with those things he does not seem to have come in contact. He made his way through the darkness to the further end, and there met the danger which cost him his life. . . .
- G I think it impossible to hold that the general duty of an innkeeper to take proper care for the safety of his guests extends to every room in his house, at all hours of night or day, irrespective of the question whether any such guests may have a right, or some reasonable cause, to be there. The duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so. Unless there was evidence fit for the consideration of a jury that any guest in the position of the deceased would, in the darkness of night, have reasonable ground for believing
- H this service room to be a water-closet, and for acting as he did, there is nothing else in the case which (as it seems to me) could make the respondents' omission to provide against dangers within that service room wrongful towards the plaintiff's husband or generally towards their guests. . . . In considering whether there was any evidence of neglect of duty by the respondents, it would not, in my opinion, be right to leave out of sight the fact that they did not so conduct their hotel as to drive their guests to grope about in dark places, or to explore unknown rooms in order to find water-closets. These conveniences were provided on that corridor in positions easily accessible, and easily discoverable by any guests in the circum-

stances of the appellant's husband, who might endeavour, with reasonable care and patience, to observe or to find them; and they were kept properly lighted at night.

So far as *Walker v. Midland Ry. Co.* (3) may be said to apply to this case, in my opinion there are many features about this case which distinguish it from *Walker v. Midland Ry. Co.* (3). This plaintiff suffered his damage the very moment he opened this door, and he opened this door in the dark. It might have been different if, having opened this door, he had gone on halfway down the steps, and had fallen then. It might then have been said: "You had no right to be going down those steps. A reasonable man would have realised then that he had made a mistake in opening that door and in going down that stairway." However, that was not this case. This plaintiff just opened this door, and immediately he was on the edge of what was almost a precipice, by reason of the tapering character of that top step, and he fell down. In my view, *Walker v. Midland Ry. Co.* (3) does not establish any such proposition as that there is no duty owed by a man who keeps a hotel to one of his paying customers in regard to the passages of a hotel or the provisions which should be made for the safety of his paying customers, who may not, perhaps, be so familiar with his hotel as he is himself.

In *Maclean v. Segar* (4), the headnote is as follows, at p. 325:

By reason of the contractual relationship existing between an innkeeper and a guest in the inn there is an implied warranty by the innkeeper that the inn premises are, for the purpose of personal use by the guest, as safe as reasonable care and skill on the part of any one can make them...

I need not bother about the next few words, but that was a case in which McCARDIE, J., dealt with many authorities applicable to this matter, and in the course of his judgment he said, at pp. 332, 333:

Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them.

Then he deals with a limitation in regard to defects which could not have been discovered by reasonable care or skill on the part of any person concerned in the construction, alteration, repair or maintenance of the premises, which does not, of course, apply in this case, and adds, at p. 333:

But subject to this limitation it matters not whether the lack of care or skill be that of the defendant or his servants, or that of an independent contractor or his servants, or whether the negligence takes place before or after the occupation by the defendant of the premises. In my opinion this rule applies to the present case. The principle is basic and applies alike to premises and to vehicles. It matters not whether the subject be a race-stand, a theatre, or an inn; whether it be a taxi-cab, an omnibus, or a railway carriage. The warranty in each case is the same, and for a breach thereof an action will lie. In my view the law is indicated with clearness and precision by Mr. Salmond in his vigorous and acute treatise on the Law of Torts, 4th Edn., p. 399. Here the jury have found, and rightly found, in the plaintiff's favour that the premises were not as safe as reasonable care and skill could make them.

That passage which I cited from the decision of McCARDIE, J., was cited

with approval by GREER, L.J., in *Hall v. Brooklands Auto-Racing Club* (5), at p. 223, where he said :

It is clear law that there is no absolute warranty that the premises are safe, but only that reasonable skill and care have been used to make them safe.

I have been referred to the judgment of SINGLETON, J., in *Lee v. Luper* (6). The facts in that case differ from the facts in this, according to the headnote, because in that case [p. 817] :

The plaintiff went to the defendant's hotel to attend a lodge meeting. While there, wishing to find a water-closet, he passed along an unlighted passage and through a door marked "private." He then attempted to switch on the light but failed, and upon taking a further step forward he fell down some steps and injured himself.

It was therefore held by SINGLETON, J., as follows :

The plaintiff was not entitled to recover, as it was not the duty of an innkeeper to maintain in a safe condition those portions of his premises where the public are not likely to resort.

That authority does not say that it is not the duty of an innkeeper—or not the duty of a hotel proprietor, for that matter—to maintain in a safe condition those portions of his premises where the public or his paying customers are likely to resort, and I hold in this case that it was the duty of the proprietors of this hotel to keep this passageway reasonably lighted at the hour of 11.20 p.m. in a hotel in London, when the hotel was patronised by customers whose hour of retirement for the night might well have been regarded as reasonable at any rate until midnight. The failure to discharge that duty, by leaving that passageway dark, led the plaintiff to incur the damage which he suffered.

It has been contended that the plaintiff himself was also negligent, and that, when he saw that the passageway was dark, he should not have gone into the passage, but should have discovered the switch, which was on the curve of the wall at a distance of something between 4 ft. 6 ins. and 7 ft. 6 ins. from the doorway of his bedroom. This, of course, the plaintiff has said that he tried to discover, but he did not, although he stretched his arms out. The defendants further say that then he should have returned to his bedroom and rung the bell or the telephone in order to get into communication with either the night porter or the managing director of the defendant company. Giving the best consideration I can to such a contention, I have come to the conclusion that in crossing that passage, as he did, to find the lavatory, the plaintiff did not act unreasonably, and was not guilty of any negligence at all, and, therefore, was not guilty of the contributory negligence alleged against him.

If I may cite *Wilkinson v. Fairrie* (2) again, the passage from the judgment of POLLOCK, C.B., relied upon in this case, was at p. 635 :

... if it was so dark that the plaintiff could not see, he ought not to have proceeded without a light ; if it was sufficiently light for him to see, he might have avoided the staircase, which is a very different thing from a hole or trapdoor, through which a person may fall. . . . It certainly was not the duty of the defendants to light the passage.

Here I hold that there was no negligence, or that it has not been satisfactorily established that there was negligence, of any kind on the part

of the plaintiff in going across that passageway for the few feet which he had to go in order to reach the lavatory door, and, further, that, when he did open that doorway at the top of the curious steps which led to the basement, and when he stepped through the doorway, he found himself, by reason of the curious formation of the steps there, stepping into nothing. That being so, I hold that the plaintiff is entitled to succeed upon either or both of the grounds which now appear in the statement of claim—either on the ground of negligence or on the ground of warranty.

Judgment for the plaintiff for £382 3s. and costs.

Solicitors: *Wrinch & Fisher* (for the plaintiff); *Wedlake, Letts & Birds* (for the defendants).

[Reported by CHARLES NEWTON, Esq., Barrister-at-Law.]

EVANS v. OAKDALE NAVIGATION COLLIERIES, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and du Parcq, L.JJ.), April 4, 1939.]

Workmen's Compensation—Compensation—Amount—Partial capacity at time of second accident—Total incapacity from second.

A workman was totally incapacitated by an accident on Aug. 12, 1935, and was paid compensation at the rate of 30s. per week. On Dec. 19, 1936, the employers reduced the compensation to 16s. 9d. per week. On July 15, 1937, they gave notice to terminate compensation in respect of that accident. As from Nov. 18, 1936, the workman was totally incapacitated by reason of silicosis, and was paid full compensation in respect thereof. There was evidence that on Nov. 18, 1936, the workman was still partly incapacitated by the first accident, but it was contended that, as there was total incapacity in respect of the second accident, and as full compensation was being paid therefor, no award could be made in respect of the first accident:—

HOLD: in view of the evidence of partial incapacity on Nov. 18, 1936, an award based on partial incapacity could be made in respect of the first accident, although the workman was totally incapacitated by silicosis and in receipt of full compensation in respect thereof.

[EDITORIAL NOTE.] Compensation is given for incapacity, and, if, at the time of a second accident, a workman is totally incapacitated by a first accident, no compensation can be recovered for the second accident. If, however, there is only partial incapacity in respect of the first accident, then an award can be made in respect of the second accident, because the workman had some capacity for work to lose. Total incapacity in respect of the second accident cannot abridge the workman's right to compensation for the first accident if there is, in fact, incapacity arising from the first accident at the time of the second accident, and this is none the less so when the employers have in fact been paying, and are paying, full compensation in respect of the second accident.

AS TO COMPENSATION IN CASES OF MORE THAN ONE ACCIDENT, see WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 258-261; and FOR CASE, see DIGEST, Supp., Master and Servant, No. 3362a.]

Cases referred to:

- (1) *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.*, [1937] 2 K.B. 426; [1937] 2 All E.R. 756; Digest Supp.; 106 L.J.K.B. 667; 156 L.T. 490; 30 B.W.C.C. 171.

(2) *Thompson v. London & North Eastern Ry. Co.*, [1935] 2 K.B. 90 ; Digest Supp. ; 104 L.J.K.B. 515 ; 152 L.T. 571 ; 28 B.W.C.C. 95.

APPEAL by the employers from the award of His Honour JUDGE THOMAS at Tredegar County Court, dated Dec. 13, 1938, in respect of an accident which occurred on Aug. 12, 1935. The workman suffered an accident which caused him to be at first wholly, and then partially, incapacitated, and he was given compensation on that basis. He obtained employment, and suffered a second accident, and was awarded compensation in respect of that. The point at issue was whether or not the workman could recover 16s. 9d. per week in respect of the first accident and also 30s. per week in respect of the second, making a total of 46s. 9d. per week, or if the compensation payable in respect of the two accidents had to be limited to 30s. per week.

J. Alun Pugh and *Griffith Williams* for the appellants.

Maxwell Fyfe, K.C., and *A. A. Warren* for the respondent.

Pugh : In order to have a second right to compensation for incapacity, the workman would have to prove that partial recovery had taken place before Nov. 18, 1936. He would have to prove the wage-earning capacity of which he had been deprived by the second accident. The judge says that certain things are facts, but there is no evidence on which the facts can be found. The judge says that the workman has proved partial incapacity before the date of the second accident. The payment had been reduced on the ground that the incapacity had sunk, and, therefore, the judge found that partial incapacity existed on that date. There was no evidence on the point. The judge is not entitled to take some subsequent happening as evidence of partial incapacity. The judge has said that *Thompson v. London & North Eastern Ry. Co.* (2) covers this case, but it does not come within *Thompson v. London & North Eastern Ry. Co.* (2), but within *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (1). The county court judge is wrong.

Fyfe, K.C. : The compensation was paid on the basis of total incapacity. up to Dec., 1936. Compensation at the lower rate, for partial incapacity, was paid up to July, 1937. The award of the county court judge operates from that date. The two accidents must be kept entirely separate. The county court judge says that he is satisfied that, at the time of the notional accident, the workman was partially incapacitated. In Dec., 1936, the employers, by notice, reduced the compensation payable from 30s. to 16s. 9d. per week. If the first accident left any earning capacity at all, the workman would be entitled to compensation for partial incapacity. There is a line of cases which says that the two accidents must be kept distinct. Nothing can take away the workman's right to compensation in respect of the first accident, so long as the incapacity continues.

Pugh, in reply : The judge should have treated the 16s. 9d. as continuing throughout, and the amount should have been made up to 30s. by treating the difference as compensation for silicosis. In July, 1937,

the workman regarded the matter as satisfactory. The workman is receiving 30s. for silicosis, but, as he is still suffering from a rib injury, he wants the 16s. 9d. for that. Total incapacity cannot wipe out partial incapacity, and that is not contended. When the compensation for the rib injury was reduced to 16s. 9d., the declaration of liability in respect of silicosis began to bear fruit. A sum of 30s. seems to be the limit fixed by the Act as the amount to be paid by the employer in respect of the two accidents. As soon as the workman begins to recover from the first accident, it should be decided what is to be paid to him in respect of the second. The total, however, should be 30s. per week. A

SIR WILFRID GREENE, M.R. : In this case, the point with which this court is concerned is one which lies in quite a narrow compass. We have been invited by counsel for the appellants to treat this appeal as though other matters were before us, and he invited us to do that because otherwise the situation, he said, would be left in a position of some doubt, or, at any rate, in a position which led to injustice to his clients. It may or may not be that the result of our decision will be that the appellants may have overpaid to the respondent money which they cannot recover. I do not propose to say anything about that one way or the other. If that be the result, it is their misfortune, arising from some misapprehension either of the facts or of the law. That question is not before us. We have one question, and one question only, before us. It arises upon the claim of the workman in respect of what has been called the first accident—that is to say, the accident which resulted in serious injury to his ribs and which happened on Aug. 12, 1935. It was in respect of that accident that he claimed compensation in the county court. The employers' attitude towards that accident was that they had paid the workman 30s. per week on the basis of total disablement as from the date of the accident down to Dec. 19, 1936, that being 10 days after the service of a notice, served under sect. 12 by the employers, of their intention to reduce the compensation to 16s. 9d. per week. They did reduce it to 16s. 9d. per week, and on July 15, 1937, they gave notice to terminate that payment on the ground of complete recovery from the first accident. The county court judge had before him the workman's claim that he was still partially incapacitated by that first accident. Evidence was given, and the county court judge found as a fact, that, at the time of the second accident—namely, the date fixed for the beginning of the total disablement from silicosis, Nov. 18, 1936—the workman was partially incapacitated as a result of his rib injury. It is said that there was no evidence to justify such a finding, and that, upon the facts, the county court judge was bound as a matter of law to find that, at the date of the second accident—namely, Nov. 18, 1936—the workman was still totally incapacitated by reason of the first accident. The result of such a finding would have been, according to the decision of this court in *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (1), that, so long as the total B C D E F G H

incapacity from the first accident lasted, no compensation could be recovered in respect of the second accident, although in respect of that second accident a declaration of liability might properly have been made. That would have been the situation on such a finding of fact, but the county court judge's finding of fact, if it can be supported, brings the case within the clear authority of the decision of this court in *Thompson v. London & North Eastern Ry. Co.* (2). The man, on that basis, at the date of the second accident, would have been a partially incapacitated man, and, therefore, there would have been a proportion of incapacity upon which the second accident could operate. It seems to me that there was evidence upon which the county court judge could so find, because, when the doctor who signed the certificate upon which the employers acted, in Dec., 1936, was called as a witness, he said that he had examined the workman on Dec. 7, 1936, and explained the condition of the man, and, in cross-examination, said that in Nov., 1936, the condition of the man was "not much different to December." That, of course, is a very concise note, but I have no hesitation in reading that as meaning that the witness was intending to say that at the relevant date—that is to say, on Nov. 18, 1936—there was not much difference between the man's state of health then when he examined him on Dec. 7, 1936. On that basis, the county court judge, it seems to me, was perfectly entitled to find that the progress of recovery by Nov. 18 had been such that the man at that time had a partial incapacity, and, having so found, he was entitled—and, indeed, bound—to award the workman compensation upon that basis, and he awarded him compensation for the future at 16s. 9d. per week. That was part of the workman's claim. It is true that, in his very brief note of his judgment, the county court judge does not in terms refer to the facts which would justify such an award for the future, but the necessary finding of fact is implicit in the award itself, and his judgment is confined to the point in respect of which the controversy was acute before him, and that related to the earlier period. When one looks at the evidence in the case, I should have thought that the finding of the county court judge, if he had found that the man was then not partially incapacitated, but fully recovered, could not possibly have stood. It is quite obvious that this man was a man partially incapacitated from the nature of the injuries he had suffered. The award, therefore, as to the future in respect of the second accident was, it seems to me, perfectly right, and could not be attacked.

The county court judge also awarded the man the payment of a lump sum as compensation for a back period in respect of that first accident. The employers had been paying to the man in respect of the first accident 16s. 9d. per week down to July 15, 1937, and then, when their notice to terminate payment for that first accident became effective, they ceased to pay the man anything in respect of the rib accident, but paid him 30s. per week as and for the silicosis. It may be that in some proceedings it was clear that they had been paying the man too much in respect of

the silicosis, but that matter is not before us, and I express no opinion about it. The only question before us is what the workman's right is, in view of the finding of fact of the county court judge in respect of the man's compensation for the first accident, as from the time in July, 1937, when the employers ceased to pay him compensation for that accident. To that question it seems to me that there is one answer, and one answer only—he should be paid compensation for that accident on the basis of the partial incapacity existing during that period. The actual figure of 16s. 9d. per week is not contested. In my opinion, the county court judge's judgment was right and must be affirmed, and this appeal must be dismissed with costs. A

CLAUSON, L.J. : I agree. B

DU PARCQ, L.J. : I agree.

Appeal dismissed with costs. C

Solicitors : *Furniss, Stephen & Co.*, agents for *A. J. Prosser*, Cardiff (for the appellants) ; *Smith, Rundell, Dods & Bockett*, agents for *T. S. Edwards & Son*, Newport, Mon. (for the respondent).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*] D

PAGET v. MAYO.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Macnaghten and Singleton, JJ.), **March 29, 1939.**] E

Street and Aerial Traffic—Reporting accidents—Accident due to presence of vehicle on road—Damage to stone wall and to vehicle—Failure of driver to report accident to police or to give name and address—Whether damage or injury to any person, vehicle or animal—Road Traffic Act, 1930 (c. 43), s. 22.

The respondent's vehicle, while being driven by him, skidded at a corner and hit a stone wall, the property of a third party. The stone wall and the vehicle were both damaged. The respondent did not give his name and address to any person, nor did he report the accident to the police, and he was charged with having thereby unlawfully acted in contravention of the Road Traffic Act, 1930, s. 22, which applies to an accident "whereby damage or injury is caused to any person, vehicle or animal." The justices upheld the respondent's contention that the damage to the stone wall was not damage within the meaning of sect. 22, and dismissed the charge. Thereupon this appeal was brought :— F

HELD : as the damage to the wall was not damage "caused to any person, vehicle or animal" within the meaning of sect. 22 of the Act of 1930, the justices were right in dismissing the charge. G

[EDITORIAL NOTE. This matter is a question of the construction of the Act so far as it relates to the reporting of accidents, and it is decided that the provision making it unnecessary to report an accident not causing damage to any person, vehicle or animal does not include any property other than the specified classes of property. It would appear also that the term "vehicle" does not here include the vehicle causing the damage, even though it is itself damaged. H

AS TO REPORTING ACCIDENTS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 675, 676, para. 998; and FOR CASE, see DIGEST, Supp., Street and Aerial Traffic, No. 232d.]

A APPEAL by way of case stated from a decision of justices sitting at Clitheroe in the county of Lancaster. The facts of the case are fully set out in the judgment.

Ralph Etherton for the appellant.

C. B. Marriott, K.C., L. A. Vine and R. Milner for the respondent.

B LORD HEWART, L.C.J. : I am clearly of the opinion that this appeal ought to be dismissed. The question is a very simple one. The information preferred against the respondent alleged that, in contravention of the Road Traffic Act, 1930, s. 22, he unlawfully failed to report an accident at a police station. The case states in para. 6 that, owing
C to the presence of the vehicle on the road, an accident occurred in the sense that the vehicle skidded at a corner and hit a stone wall the property of one Proctor, that, by reason of that accident, the stone wall was damaged, as also was the vehicle, and that the respondent did not
D give his name or address to any person (he was not in fact asked by anybody), nor did he report it to a police station or a police constable. It was contended on behalf of the respondent that the damage to the wall was not damage or injury to any person, vehicle or animal within the meaning of sect. 22, and that, accordingly, he had committed no offence. The justices were of opinion that the contention of the respondent was right in law. They held that the respondent had committed
E no offence, and so dismissed the information. In my opinion, it is quite obvious that the justices were right in dismissing the information. Sect. 22 (1) of the Act of 1930 provides that certain things must happen :

F If in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal . . .

Mr. Etherton, on behalf of the appellant, ingeniously suggests that we ought to read the words "any person, vehicle or animal" as if they had been written "any person, property, vehicle or animal." If the legislature had intended to say "property," nothing would have been
G easier than to say it. If, however, the words which have been suggested had really been inserted, the question would then have arisen : "Is not a vehicle somebody's property ?" Nor would the difficulty have ceased there, because, when one looks at sect. 22 (3), it is expressly provided that :

H . . . the expression "animal" means any horse, cattle, ass, mule, sheep, pig, goat, or dog.

Horses, cattle, asses, mules, sheep, pigs, goats or dogs are commonly somebody's property. Why should a special protection be extended to those heads of property by subsect. (3) if by subsect. (1) all property is

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already included? In my opinion, the justices were clearly right, and
this appeal ought to be dismissed.

MACNAGHTEN, J.: I agree, and have nothing to add.

SINGLETON, J.: I agree.

Appeal dismissed with costs.

Solicitors: Norton, Rose, Greenwell & Co., agents for Sir George
Etherton, Preston (for the appellant); Amery-Parkes & Co. (for the
respondent).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

BANQUE DES MARCHANDS DE MOSCOU
(KROUPETSCHESKY) AND ATTORNEY-GENERAL v.
MIDLAND BANK, LTD.

[COURT OF APPEAL (Clauson, Luxmoore and du Parcq, L.J.J.), March 27,
1939.]

*Practice—Joinder of plaintiffs—Common questions of law or fact—One party
the Crown claiming bona vacantia—Judicial discretion—R.S.C., Ord. 16,
r. 1.*

The plaintiffs, a Russian bank, dissolved in Russia in or before 1918,
and the Attorney-General, claimed an account from the defendants,
and payment of all sums found due thereon. In 1932, the Russian
bank was ordered to be wound up "without prejudice to the claims of
the Crown to any of the assets of the bank which may have become
bona vacantia." Subsequently, the Attorney-General claimed to be
entitled to the moneys, which, he alleged, had become the property of
the Crown, and his claim and the bank's claim were joined in the same
statement of claim. Thereupon, the present summons was taken out
by the defendants, asking that the statement of claim should be struck
out, or, alternatively, that the plaintiffs should be ordered to elect which
of them should be allowed to proceed with the action, the summons being
based upon the provisions of R.S.C., Ord. 16, r. 1:—

HELD: (i) as there were numerous common questions, as provided
by R.S.C., Ord. 16, r. 1, the plaintiffs had brought themselves within
the terms of the rule, and were rightly joined in the same action.

(ii) the defendants were not at that stage entitled to an order for
separate trials, but they might, if so advised, apply at any time for
such an order.

[EDITORIAL NOTE.] The real issue in the present application is whether there
was a common question of law or fact in the action. It was argued here that the
bank was concerned with the relationship of creditor and debtor between it
and the plaintiffs, but the Crown were setting up a claim based on prerogative—
namely, that certain property had become *bona vacantia*. There is a certain distinc-
tion in this respect, but the Court of Appeal have held that both matters arise out
of the same facts and have so much in common that they ought to be proceeded
with in the same action.

AS TO JOINDER OF PLAINTIFFS, see HALSBURY, Hailsham Edn., Vol. 26,
pp. 19, 20, paras. 15, 16; and FOR CASES, see DIGEST, Practice, pp. 399-403,
Nos. 1011-1050. See also YEARLY PRACTICE OF THE SUPREME COURT,
1939, pp. 191-195.]

Cases referred to :

- (1) *Stroud v. Lawson*, [1898] 2 Q.B. 44; Digest, Practice, 401, 1020; 67 L.J.Q.B. 718; 78 L.T. 729.
- (2) *Bendir v. Anson*, [1936] 3 All E.R. 326; Digest Supp.
- (3) *Payne v. British Time Recorder Co., Ltd., and Curtis, Ltd.*, [1921] 2 K.B. 1; Digest, Practice, 408, 1084; 90 L.J.K.B. 445; 124 L.T. 719.

A APPEAL by the defendants from an order of BENNETT, J., dated Feb. 24, 1939. The defendants upon a summons asked that the statement of claim should be struck out by reason of misjoinder of plaintiffs, or, alternatively, that the plaintiffs should be put to election as to which of them was entitled to proceed.

B The summons was before BENNETT, J., on Feb. 24, 1939, when the following judgment was delivered.

J. H. Stamp and Hon. H. L. Parker for the plaintiffs.

C Hon. Sir Stafford Cripps, K.C., and A. Andrewes Uthwatt for the defendants.

D BENNETT, J. : The statement of claim in this action shows that there are two plaintiffs, the Russian bank and the Attorney-General on behalf of the Crown. The defendants are the Midland Bank, Ltd. The claim is in effect a claim to recover a sum of money alleged to have been in the hands of the defendants on behalf of the Russian bank, as their bankers, before Jan. 26, 1918. The statement of claim alleges that the Russian bank was dissolved on Jan. 26, 1918, and, as from that dissolution and destruction, ceased to carry on business, subject to what is thereafter alleged in the statement of claim. Para. 3 is as follows :

E By an order of this honourable court made on May 30, 1932, it was ordered that the plaintiff company should be wound up without prejudice to the claims of the Crown to any of the assets of the plaintiff company which may have become *bona vacantia*. By a further order dated Oct. 10, 1932, one David Howat Allan was appointed liquidator for the purpose of such winding up.

F Para. 4 is as follows :

Prior to and at Jan. 26, 1918, the plaintiff company employed, *inter alia*, the defendants as their bankers or otherwise as their agents or trustees and the defendants at their head office in the city of London held 4 accounts for the plaintiff company . . .

G Then the names of those 4 accounts are stated. Para. 5 is as follows :

As at Jan. 26, 1918, there was a considerable sum to the credit of the plaintiff company in respect of the aggregate balance on the said 4 accounts and after the said date further sums came into the possession of the defendants purporting to act as the plaintiff company's bankers or otherwise as their agents or trustees as aforesaid . . .

H Then there is a reference to the sums of money. Paras. 6, 7 and 8 are as follow :

6. By letter dated Sept. 2, 1938, the Treasury Solicitor on behalf of the plaintiffs demanded an account and payment by the defendants of the balance standing to the credit of the plaintiff company as at Jan. 26, 1918, together with an account and payment of all further sums which thereafter came into the possession of the defendants purporting to act as the plaintiff company's bankers, or otherwise as their agents or trustees, and interest. The defendants have failed and by letter

dated Sept. 15, 1938, from their solicitors have refused to accede to such demand.

7. In the premises the plaintiff company is entitled with the consent and approval of His Majesty's Attorney-General which is hereby given to the said account and to recover such moneys from the defendants.

8. In the alternative His Majesty's Attorney-General repeats the premises set out in paras. 2, 4, 5 and 6 hereof. By reason of the said dissolution and destruction all moneys funds or other property whatsoever of the said company have become and are the property of His Majesty in right of his Crown and by virtue of his Royal Prerogative. A

Then follows the claim :

And the plaintiff company with the consent and approval of His Majesty's Attorney-General claims [an account, and payment of what should be found due upon the taking of the account]. Alternatively His Majesty's Attorney-General claims (4) a declaration that the plaintiff company was on Jan. 26, 1918, or at some date long since dissolved and destroyed under Russian law and has long since ceased to exist as such, (5) a declaration that His Majesty is entitled by virtue of his Royal Prerogative and in right of his Crown to all funds, securities, moneys, and other property whatsoever of the said dissolved company [and then, upon the footing of those two declarations, an account, and payment of what is found to be due]. B

That being the statement of claim, the summons before me is a summons by the defendants asking for the following relief : C

That the plaintiffs' statement of claim be struck out on the ground that the same tends to prejudice embarrass and delay the fair trial of this action or alternatively that the plaintiffs may be ordered to elect which of them should be allowed to proceed with the action and that upon such election the writ and statement of claim be amended by striking out all parts thereof referring to the claim of the other plaintiff or that such further or other order may be made in the premises as to this honourable court shall think fit. D

The claim is based upon the provisions of R.S.C., Ord. 16, r. 1, and is put in two ways. First of all, it is said that, as a matter of construction, the facts alleged in the statement of claim do not bring the case within the terms of the rule so as to enable the two plaintiffs to combine in the action. Secondly, assuming that the case is brought within the terms of the rule, as a matter of discretion, the court should strike out the claim of one of the plaintiffs, because, if both claims remain as they are now pleaded, it is said that the defendants will be embarrassed. E

The rule reads as follows : F

All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative where if such persons brought separate actions any common question of law or fact would arise ; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other order as may be expedient. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. G

Then there follows a provision as regards costs, which I do not think is material.

The first question is whether the plaintiffs have brought themselves within the terms of the rule. To bring themselves within the terms of the rule, the right to relief must be in respect of, or arise out of, the same transaction, or series of transactions, and there must be involved some common question of law or fact. It seems to me that the series of transactions in respect of which, or out of which, the action of both H

the plaintiffs arises is the series of actions which resulted in there being in the defendant bank on Jan. 26, 1918, a sum of money. The next question is whether there is any common question of law or fact. It seems to me that there may be. First of all, there is this common question to an action, whether it be brought by the plaintiff company

A or by the Attorney-General—namely, the dissolution of the plaintiff bank in Russia, and the effect of the dissolution on Jan. 26, 1918. Then, another common question—whether the action be brought by the plaintiff company or by the Attorney-General—would be the effect of the winding-up order stated in para. 3 of the statement of claim, and, on the language of the rule, which has more than once been said to be a rule which should receive liberal interpretation, in my judgment, the plaintiffs have brought themselves within its terms. Thus, as a matter of strict right, the defendants, in my judgment, have no right to have the statement of claim struck out.

C Finally, the question is whether the defendants will be embarrassed by the two causes of action, so to speak, being proceeded with against them at one and the same time. I have struggled to discover by questions in the course of the argument whether or not there is any real ground for supposing that the defendants will be embarrassed by having to resist the claims of both these plaintiffs at one and the same time, and I have failed to receive from their counsel any answer which satisfies me that there will be the smallest embarrassment to them. There was some question about a plea of the Statute of Limitations, but, as to the precise moment when they were going to be embarrassed by having the plea on the record or by not having the plea on the record, I was unable to obtain any satisfactory answer. I can see no ground, because no ground has been established before me, which satisfies me, or produces the smallest impression on my mind to the effect, that the defendants will be in the least embarrassed by the action proceeding in its present form, and, as a result, I see no ground upon which I can properly exercise my discretion and put the plaintiffs to the election to which it is suggested I should put them. For these reasons, in my judgment, the application fails, and must be dismissed with costs.

G The defendants appealed.

Hon. Sir Stafford Cripps, K.C., and A. Andrewes Uthwatt for the appellants.

The Solicitor-General (Sir Terence O'Connor, K.C.), J. H. Stamp and Hon. H. L. Parker for the respondents.

H *Cripps, K.C.*: The question which is raised in this case is whether or not the two plaintiffs ought to be joined. R.S.C., Ord. 16, r. 1, was altered in 1896, and the decisions with regard to it seem to have been conflicting. The first point is as to what constitutes the same transaction or series of transactions. The second point is as to what common question of law or of fact would arise. Does this mean that there will

be some common question of law or of fact, or does it mean that the principal question will be a common question of law or of fact? As regards the same transaction or transactions, there is the banking relationship between the Russian bank and the Midland Bank, Ltd., and there is a possibility that the Russian bank has been reconstituted. The questions which arise are whether or not there is a relation of debtor and creditor between the Russian bank and the Midland Bank and whether or not a sum of money which is in the hands of the Midland Bank belongs to nobody. The Attorney-General does not raise any question as to the reconstitution of the bank. In para. 8 of the statement of claim he does not repeat that which is contained in para. 3. The matter between the Attorney-General and the Midland Bank arises out of a statutory or common law relationship in respect of a claim to property of which there is said to be no owner, and that relationship is not one of debtor and creditor. The relief which is claimed does not arise out of the same transaction. The position of the Crown is a peculiar one, and it arises owing to the fact that the Midland Bank have in their possession a sum of money to which nobody has a claim. The rule when it speaks of "any common question of law or fact" must refer to a question that is a substantial matter in the cases. The only grounds put forward in the present case are the dissolution of the plaintiff bank in Russia and the effect of the winding-up order. The winding-up order cannot be a factor common to the two cases, because the Attorney-General has not pleaded it. The law as to *bona vacantia* is quite different from that as to debtor and creditor. The Statute of Limitations could arise with regard to the bank only, and not with regard to the Crown. There is no reason except the convenience of litigation for putting upon the defendants the onus of meeting two plaintiffs at the same time. If no advantage will be gained thereby, it is better that there shall be separate actions. The statement of claim in the present case does not fall within R.S.C., Ord. 16, r. 1, and the actions should be set down or started separately. They could be consolidated, of course, when it is known what the issues will be. [Counsel referred to *Stroud v. Lawson* (1), *Bendir v. Anson* (2) and *Payne v. British Time Recorder Co., Ltd.*, and *Curtis, Ltd.* (3).]

The Solicitor-General: There is nothing in the rule to prevent an application at any time. The rule does not limit the defendant to any time for the making of an application. R.S.C., Ord. 16, r. 11, deals with the situation so far as the court is concerned, and the court may act without an application being made by either party. The Crown is relying upon the liquidation order. It is only if the court decides that the liquidation order is bad that the claim to *bona vacantia* will be relied upon.

CLAUSON, L.J.: This is an appeal from a decision of BENNETT, J., that he did not think fit to make any order upon an application made

to him by the defendants in the action. The application made to him was for an order :

. . . that the plaintiffs' statement of claim be struck out on the ground that the same tends to prejudice embarrass and delay the fair trial of this action or alternatively that the plaintiffs may be ordered to elect which of them should be allowed to proceed with the action and that upon such election the writ and statement of claim be amended by striking out all parts thereof referring to the claim of the other plaintiff or that such further or other order may be made in the premises as to this honourable court shall seem fit.

The action is brought by two plaintiffs, a Russian bank, to which I will refer as the Russian bank, and the Attorney-General, on behalf of the Crown. There is one defendant, the Midland Bank, Ltd.

The facts can be stated quite shortly. The Russian bank were customers of the defendants, the Midland Bank, Ltd., and it would appear that, subject, no doubt, to the possibility of there being various questions as to cross-claims, in Jan. 26, 1918, the Midland Bank held a very substantial balance in London for their customer. It is alleged that on that date, by reason of certain provisions of, and proceedings under, the Russian law, the Russian bank was dissolved and destroyed. However, some years afterwards, on May 30, 1932, there was an order in this court that the plaintiff company be wound up without prejudice to the claims of the Crown to any of the assets of the plaintiff company which may have become *bona vacantia*, and a liquidator was appointed in the ordinary way. In due course, a demand was made on behalf of the plaintiffs—which I understand to mean on behalf of the two plaintiffs, the Russian bank in liquidation and the Crown—for payment by the defendants of the balance which stood to the credit of the Russian bank in Jan., 1918, and an account, and so forth, was also claimed. The claim as set out in the statement of claim is twofold. In the first place, the Russian bank, with the consent and approval of the Attorney-General, claim an account and payment, and the Attorney-General claims a declaration that the bank ceased to exist in 1918, and that, by virtue of his Royal Prerogative, and in right of his Crown, His Majesty is entitled to all the property of the dissolved company. Then it goes on to claim an account and payment against the bank, on the footing which I have indicated of the defendant bank being debtors to the Russian bank for a large sum as at the date of the dissolution.

The first question is whether or not it can be said of this action, having regard to the writ and the statement of claim, that it is wholly irregular. The suggestion that it is wholly irregular is based upon R.S.C., Ord. 16, r. 1, which is in these terms :

All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative where if such persons brought separate actions any common question of law or fact would arise . . .

It is submitted on behalf of the defendants that, in the first place, it cannot be said of these two plaintiffs that a right to relief is alleged to

exist in them in respect of, or arising out of, the same transaction or series of transactions. In my view, that suggestion is utterly baseless. The basis of the action is the existence of a certain state of account, if I may so express it, as between the Russian bank and the defendant bank on the particular date—the crucial date—in Jan., 1918. That is the basis of the claim for relief. It appears clear to me that these plaintiffs base their right to relief on something arising out of the same transaction—namely, the same matter, the state of account as between the two banks on the crucial date. I agree that there is a point at which the two plaintiffs part company, and rely on *sequelæ* to the original transaction which are not identical, but that does not seem to me to support in any way the suggestion that the right to relief which is alleged to exist does not arise out of the same transaction. It may be that the common character of the transactions on which the two plaintiffs rely extends somewhat further. It may be thought—and here I think we are on slightly more difficult ground—that, in each case, first of all the dissolution, and then the winding-up order, may be part of the same transaction. It appears to me, however, that that does not matter if we have as a substantial basis of that which is claimed a transaction which is a common element leading to the right to relief in the two plaintiffs respectively. The rule goes on in this way:

. . . in whom any right to relief . . . is alleged to exist, whether jointly, severally, or in the alternative where if such persons brought separate actions any common question of law or fact would arise. . . .

In this particular case, there is first of all, in my view, the common question—it may be more a question of fact than one of law, though it may well involve considerations of law—as to what is the true view concerning the state of account between the parties on the critical date. I mention that because I am not quite sure that the judge regarded that as a matter in respect of which there was a common question of law and fact. I want to make it clear that, so far as I am concerned, I think that at that point it may well be that there may be common questions of law or of fact. I say that it may well be that there are such questions, but of course it is obvious that it may well be that, by reason of admission or of one thing and another, the question may cease to be of importance, so far as the trial of the action is concerned. There is then the next common question—again one of law and of fact mixed—and that is as to the operation of the Russian law which is spoken of in the statement of claim as effecting a dissolution of the Russian bank as on the date in 1918. Further, so far as I can judge from the statement of claim, I should have thought that there was at least a high probability that there would be a common question of law as to the exact effect of the winding-up order, and of the winding-up order in this particular form. There I agree. I think that there is a little more to be said for the view that at that point the common character of the questions may have ceased, or that it may have ceased before that point. Whether or not

that point is one which is common to the two cases will very likely emerge when the defence is put in. That leads me to the next matter which has to be considered. For the reasons I have given, my view is that these proceedings are plainly regular, and within the first part of the rule already set out.

- A The next point that arises is whether or not the court ought to take advantage of the proviso which I will now proceed to read, and make some special order to protect the defendants' interests. The proviso is in these terms :

- B Provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other order as may be expedient and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief . . .

- The application to the judge, it will be observed, was on the lines that he should stay one part of the action and direct the other part of the action by the other plaintiff to be turned into a separate action. In my view, there is no reason whatever for making an order of that sort at this time. As matters stand, I should have thought that it would be exceedingly convenient that the common question which seems to me plainly to arise should be dealt with in this action. Nevertheless, I can well conceive that, if the pleadings are closed, and after there have been the usual developments in an action of this kind—which of course involves large sums of money, and may involve a number of complications which do not appear on the face of the statement of claim—it may well be that at some future time the defendants may have a case for coming to the court and asking for some separate order. At the moment, however, they have not made out such a case. I do want to make it clear that, in my judgment, on the wording of this rule, it is open to the defendants at any time, notwithstanding that they have failed to obtain a special order at this stage, to come forward and make out a proper case to show that, in the circumstances, justice cannot properly be done without some special provision being made to protect them under the latter part of the rule. Accordingly, I take the same view about the matter as that of the judge below, and, in my judgment, the appeal should be dismissed.

- G LUXMOORE, L.J. : I entirely agree, and do not desire to add anything.

DU PARCQ, L.J. : I agree.

Appeal dismissed with costs.

- H Solicitors : Coward, Chance & Co. (for the appellants) ; Treasury Solicitor (for the respondents).

[Reported by F. HONIG, Esq., and W. K. SCRIVENER, Esq., Barristers-at-Law.]

BURFITT v. A. & E. KILLE.[KING'S BENCH DIVISION (Atkinson, J.), **April 4, 1939.**]

Negligence—Thing dangerous in itself—Sale—Duty to warn purchaser or refrain from sale—Liability to stranger injured—Sale of pistol and blank ammunition to boy aged 12.

Trade—Restraint of trade by statute—Sale of pistol—Ammunition—Blank cartridges—Firearms Act, 1937 (c. 12), ss. 11, 16 (2), 19, 32.

Practice—Costs—Liability of a poor person—Defendants to pay costs—Part of damages to be paid to plaintiff as costs—R.S.C., Ord. 16, r. 31.

A., a boy of 12, purchased from the defendants' shop a pistol and 100 rounds of blank cartridges. The pistol had a U-shaped barrel, so that only blank cartridges could be fired from it. The cross-sectional area of the barrel was about one-third of that of the cartridge, and this fact, in addition to the fact that the discharge gases had the two corners of the U-shaped barrel to traverse, caused a back pressure liable to strain the breech block and loosen the pivot screw. In addition, when the pistol was discharged, the barrel was liable to become blocked with fouling unless it was cleaned after a few shots had been fired, and thereby the already small area available for the escape of the gases would be further restricted. No warning was given to A. regarding the necessity of cleaning the barrel, nor was any cleaning apparatus supplied with the pistol. While A. was playing with the infant plaintiff, a boy 2 or 3 years younger than A., he fired the pistol into the air, and the infant plaintiff, who was standing near, received a small piece of copper in his eye, with the result that he lost the sight of that eye. It was found that the back pressure had caused the breech block of the pistol to bend, thereby making a gap through which a small piece of the rim of the cartridge had been blown:—

HELD: (i) the pistol sold with the ammunition constituted a thing dangerous in itself in the hands of a boy of 12 years of age, and the defendants should have refrained from selling it to the boy.

(ii) the term "ammunition" in the Firearms Act, 1937, s. 32, includes blank ammunition.

(iii) the sale of the blank ammunition to A. was unlawful under sects. 11 and 19 of the Act, as he had no certificate and was under 17 years of age.

(iv) although the plaintiff was suing as a poor person, this was a proper case in which the defendants should pay £20 in respect of costs, and £30 in respect of costs should be paid out of the damages recovered by the infant plaintiff.

[EDITORIAL NOTE.] The question here is whether a pistol of the nature of the one here sold to the playmate of the infant plaintiff was in itself a dangerous thing so that the law will imply a duty upon the seller to warn the purchaser of the danger, and, in the event of the seller failing to do so, will treat such failure as negligence of which a third party injured by this dangerous thing may take advantage. This is held to be so, and the matter is carried a step further. A young boy not being a competent person, nor one who should be entrusted with a pistol of this nature, a warning is not a sufficient protection for third parties, and the defendants should have refrained from selling such an article to one incompetent to use it with safety to third parties. A second point arises in the case as to the meaning of ammunition in the Firearms Act, 1937, upon which it is held that this term includes blank cartridges. A further point in this case is that the judge saw his way, in the exercise of his discretion, to award certain costs to be paid, although the plaintiff was suing as a poor person, part of these costs to be paid by the defendants and part to be paid out of the damages awarded to the infant plaintiff.

AS TO NEGLIGENCE IN RESPECT OF THINGS DANGEROUS IN THEMSELVES, see

HALSBURY, Hailsham Edn., Vol. 23, pp. 631, 632, para. 886; and FOR CASES, see DIGEST, Vol. 36, pp. 56-58, Nos. 353-364.

AS TO COSTS IN POOR PERSONS' CASES, see YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 239-241.]

Cases referred to :

- A (1) *Dominion Natural Gas Co., Ltd. v. Collins & Perkins*, [1909] A.C. 640; 36 Digest 28, 142; 79 L.J.P.C. 13; 101 L.T. 359.
- (2) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
- (3) *Bottomley v. Bannister*, [1932] 1 K.B. 458; Digest Supp.; 101 L.J.K.B. 46; 146 L.T. 68.
- B (4) *Hodge & Sons v. Anglo-American Oil Co.* (1922), 12 Lloyd, L.R. 183.
- (5) *Blacker v. Lake & Elliot, Ltd.* (1912), 106 L.T. 533; 36 Digest 56, 353.
- (6) *Heaven v. Pender* (1883), 11 Q.B.D. 503; 36 Digest 8, 9; 52 L.J.Q.B. 702; 49 L.T. 357.
- (7) *White v. Steadman*, [1913] 3 K.B. 340; 8 Digest 72, 481; 82 L.J.K.B. 846; 109 L.T. 249.

- C ACTION for damages for negligence in selling a blank-cartridge pistol alleged to be a thing dangerous in itself. A further claim was added by amendment, alleging that the sale of certain blank cartridges with the pistol was illegal and in contravention of the Firearms Act, 1937, s. 19.
- D The claim under this second head was based upon a breach of statutory duty. The facts are fully set out in the judgment.

E. Stewart Fay for the plaintiff.

Clive S. S. Burt for the defendants.

- E ATKINSON, J. : On Apr. 23, 1938, a boy named Alexander bought a so-called safety pistol at the defendants' shop in Minehead and two boxes each containing 50 blank cartridges. He went into the shop and asked the girl who attended to him for a blanker, or a blank-cartridge pistol. She produced a box of them. The price was only 2s. 3d., but she said that she was not really supposed to sell them. He said that he would see if he could find a better one, and went to another shop. They had some more expensive pistols there, but refused to sell him one, so he went back to the defendants' shop and said that he would have one of those which had been shown to him. He was shown one, and then asked for the cartridges and was sold 100. The following morning he was playing about with the pistol and fired about half the cartridges. In the afternoon, the plaintiff, a boy some two or three years younger than Alexander, was playing with him, and Alexander fired this pistol into the air. The plaintiff, who was standing by, received a tiny bit of copper in his eye—I think it was the right eye—with the result that he ultimately lost the sight of it.
- H

In this action, the plaintiff claims damages against the defendants for selling the pistol and cartridges to Alexander. It is said that the pistol and cartridges were something intrinsically dangerous in the hands of a boy such as Alexander, and that the defendants were guilty of negligence towards the infant plaintiff, as a playmate of Alexander, in selling these

things to Alexander. It is further said that the sale of the cartridges was illegal, in that it was a sale forbidden by the Firearms Act, 1937, s. 19. The latter complaint was not made in the statement of claim as originally drawn, and, at the hearing of a summons for particulars, it was said that no breach of statutory duty was alleged. Notwithstanding that, however, I did not think it right to exclude it, and I gave leave to the plaintiff to amend the statement of claim, which was done by the addition of a paragraph alleging that the sale of the blank cartridges was in contravention of the Firearms Act, 1937, s. 19, and that the infant plaintiff, being a person for whose protection and benefit that section was passed, was entitled to damages for breach of statutory duty. A

The first issue of fact was raised by a denial by the defendants of the sale. I have no doubt that the boy Alexander was telling the truth, for he gave his evidence in a very convincing way. Soon after the accident, he told Mr. Rutter, the plaintiff's solicitor, exactly where the shop at which he had bought the pistol was, and he described how he got there after leaving a cinema. He said that he had been served by a girl. Mr. Rutter went to the spot described, found there the defendants' shop, and found that there were pistols for sale exactly like the one sold, and that the selling was done by a girl. Later, he asked the boy to take him to the shop, and the boy took him straight to the defendants' shop. B

There is no evidence that these pistols are sold in any other shop in Minehead. All the salesgirls deny the sale, and a till-roll was produced which, they said, disclosed no record of such a sale. A girl might easily forget to make a record, however, or might, I suppose, include it in the next sale, particularly if she were conscious of making a sale which she felt she ought not to be making. I must say that I found it very difficult to believe that that sheet which was produced was a complete record of the sales in the shop for that day. Be that as it may, however, their evidence was not at all convincing to me, whereas the boy's was. C

The next matter to determine is whether the plaintiff has established that the defendants were under any, and, if so, what, duty towards him. The question as to when a seller of a chattel owes a duty of care to persons other than the purchaser has been repeatedly debated, and no one can pretend that the law is yet clearly settled. It is clear, of course, that there can be no duty based on contract, but the cases, in my opinion, establish the following propositions relevant to this case. The first is that, if A places in the hands of B a chattel which belongs to a class of things dangerous in themselves in the hands of such a person as B as distinguished from a chattel which is dangerous only because of some defect peculiar to the particular chattel handed over, a duty of care rests upon A, not only towards the recipient, but also towards all such persons as may reasonably be contemplated as likely to be endangered. D

In *Dominion Natural Gas Co., Ltd. v. Collins & Perkins* (1), LORD DUNEDIN said, at p. 646 : E

It has, however, again and again been held that in the case of articles dangerous F

in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity.

In *M'Alister (or Donoghue) v. Stevenson* (2), LORD MACMILLAN said, at p. 611 :

A The exceptional case of things dangerous in themselves, or known to be in a dangerous condition, has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

B Previously LORD ATKIN had said, at p. 596 :

The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods ; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle.

C He then referred to *Dominion Natural Gas Co., Ltd. v. Collins & Perkins* (1), and to what LORD DUNEDIN said, and, after reading the quotation which I have read, went on, at p. 596 :

This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved ; but clearly in the class of things enumerated there is a special duty to take precautions.

D The seller of goods who is not the manufacturer cannot control the manufacturer, but it rests with him to determine to whom he will sell and to whom he will not. The duty resting upon him may, in some cases, be adequately performed by a proper warning. If it cannot, the duty must be to refrain from the sale. In *Bottomley v. Bannister* (3),
E SCRUTTON, L.J., who was really quoting what he had himself said in *Hodge & Sons v. Anglo-American Oil Co.* (4), at p. 187, said, at p. 473 :

I go on to say : " It is not quite clear what is the distinction between the other agency, which is no excuse, and the conscious act of volition, which is an excuse. Probably the owner fulfils his duty if he entrusts the dangerous thing to a competent person who knows or is warned of the danger. I think that if the danger is caused by : (1.) the negligence of the defendant in handing without warning a dangerous thing to a third party ; (2.) the act of that third party in dealing reasonably with the thing, in ignorance of its dangerous character, the defendant would not be excused. If, however, the defendant hands the dangerous thing, with warning of its character, on to a competent person who knows of its character, though neither the warning nor the knowledge is of the exact amount of the danger, I do not think the defendant is liable to third parties for the action of the receiver, which is unreasonable in view of this knowledge or warning. His action, is, I think, *nova causa interveniens*."

This seems to recognise that a warning is not a sufficient discharge of duty if the person to whom the chattel is delivered is not a competent person.

H With reference to the first proposition, *Blacker v. Lake & Elliot, Ltd.* (5) was much relied upon by the defendants, particularly certain passages from the judgment of HAMILTON, J., but I think that the defendants omitted to observe that HAMILTON, J., made it quite clear when he said, at p. 536 :

... in my opinion we are not dealing here with the case of the sale of any commodity which is, as it is sometimes expressed, dangerous *per se*. This commodity is dangerous only *sub modo*.

Thus anything HAMILTON, J., said in that case had no reference at all to things which are dangerous in themselves.

The second proposition which I think is established, is that, if A puts into the hands of B, without due warning, a chattel not belonging to a class of things dangerous in themselves, but likely to cause danger because of some defect in its manufacture or repair of which he knows, or ought to know, he is liable for injuries caused to others by reason of his act. *Heaven v. Pender* (6) and *White v. Steadman* (7) are illustrations of this rule.

It will be observed that the first proposition involves no question of the knowledge of A. The duty has never been stated to rest upon knowledge. If A chooses to sell things of a class dangerous in themselves, he cannot be heard to say that he did not know of or appreciate the danger. If a man who ought to be selling toys chooses to deal in drugs and firearms, he cannot be heard to say that he did not know that certain drugs were poisons, or that firearms might be dangerous. Yet it would seem hard to impute negligence to a seller of goods apparently safe, but dangerous only because of some defect of which the seller could not reasonably be aware. I know that SCRUTTON, L.J., said that he did not understand the difference between a thing dangerous in itself, such as poison, and a thing not dangerous as a class but by negligent construction dangerous as a particular thing, and that the latter seemed to him the more dangerous of the two. However, with all respect, the distinction rests, not upon the measure of the danger, but upon the circumstances creating the duty.

The plaintiff contends that the pistol sold to Alexander along with the cartridges was—in his hands, at any rate—a thing dangerous in itself, and dangerous, not merely to Alexander, but also to other children with whom he might be playing. I have had the advantage of the evidence of Major Pollard, which I accept in its entirety. The Firearms Acts, 1920 to 1937, forbade the purchase, acquisition or possession of firearms or ammunition, without a certificate. This pistol is designed so as to be outside the definition of these prohibited firearms, but pistols of this kind are real firearms, specially adapted to be used with blank cartridges, and so designed that no ready-made bullets can be used in them. Despite this, they are dangerous, and capable of inflicting serious injuries at close quarters. To describe them as safety-pistols is to mislead and to encourage ignorant users to regard them as toys, which they are not. The barrel, instead of being straight, is in the shape of a flat-bottomed U. The cartridge is placed in a breech at the top of the right-hand leg, and the discharge passes down into, and along the bottom of, the U, coming up the left-hand leg to discharge into the air. The gas-blast from the vent is, says Major Pollard, little less dangerous than a bullet. He had held the shank of a raw leg of mutton against the vent, and, when the cartridge was discharged, the flesh was split down to the bone and a large burnt and blackened wound 1 in. in diameter was produced. The experiment was

repeated in the witness-box, and the result was astounding. In that case, the bone itself was shattered. It is obvious that, if a playmate or anybody else grabbed the pistol with his hand over the vent at the moment of discharge he might well lose one or two fingers. If the pistol was discharged in a struggle, with the vent against the abdomen of a child, the result might, says Major Pollard, be fatal. However, this is not the only, or even the worst, danger. The other is the back pressure. To begin with, the gas is checked in its passage by two right angles which cause the back pressure to be higher than it would be if it were discharged into a straight tube. In addition to this, there is the small area of the tube itself. The chamber has a diameter of .228 in., of course designed to take a .22 calibre blank. The horizontal section is only .125 in. in diameter. The area of the bottom of the chamber is, therefore, .038 sq. in., and the area of the bottom tube is only .0123 sq. in. In other words, a cartridge designed to be fired in a barrel of .22 in. diameter is being discharged into one with less than one-third the proper cross-sectional area. This means a dangerous rise in back pressure, with strain on the breech block, which is simply a steel stamping less than .1 in. thick. This pivots on a screw which passes into a projection which is part of the frame. The breech block engages loosely with a slot, and is held down by the fall of the hammer. The pivot screw is not designed to take strain, and there is nothing to prevent it from working loose. If it does work loose, the breech block can lift a little. Alexander said that the screw did work loose, and that he had to tighten it. There is another danger, however. The cartridge contains a compressed mass of some modified form of black powder under a thin card wad. It is rim-fired, and, every time the pistol is fired, there is left in the bottom barrel a deposit of powder, *débris* of card wad, and perhaps one or two flakes of metal from a split cartridge case. When Major Pollard examined this pistol, which was after one morning's use, when some 40 or 50 shots had been fired, he found the barrel partly blocked with a mass of fouling so compact that it had to be removed with a drill. It had, of course, materially restricted the already too small area available for the free escape of gas, and so created an enormous rise in the gas pressure. The presence of this fouling is inseparable from the type of cartridge used. It is of vital importance to keep this barrel clean. Access to it is gained by removing a small screw below the dummy barrel. This ought to be removed and the barrel cleaned every 4 or 5 shots. Of course, Alexander knew nothing of this. He used to shake out anything he saw in the vent hole, but he had received no warning as to the necessity for cleaning the barrel. Some 15 months ago—the evidence was that it was 12 months before the trial—the Modern Arms Factory, which imports and sells these pistols, began to sell them in boxes containing a cardboard slip bearing these words :

Important : Please make sure that the vent is clean before firing. It is essential to remove the small screw underneath the barrel periodically for cleaning purposes.

No such warning was given to Alexander, and I doubt whether he would have understood it if it had been. At any rate, the danger of this choking had been appreciated by the importers at a date before this accident.

The great increase of back pressure in this particular case had caused the breech block of the pistol to bend. There was a gap, said Major Pollard, of .028 in. The thickness of the metal of the cartridge is .008 in. A The gap is, therefore, amply wide enough to allow a fragment of copper to be blown through, and, when pressure becomes excessive, rim fire cases fail, and burst at the rim. That happened in this case. The pistol was not fired after the accident. Mr. Richards, brother-in-law to Mr. Burfitt, removed the cartridge case. The bit of copper taken from the B plaintiff's eye fitted into a gap in the rim of the case. Under the stress of explosion, the gap would probably be greater than .028 in. I think that Major Pollard's summary is well-founded, and I find that the pistol is very dangerous, that the accumulation of fouling in an inaccessible horizontal chamber means a cumulative increase of danger invisible to C the owner, that it becomes more dangerous with wear, and that serious wounds can be caused with such a pistol, even when new and in perfect order. Major Pollard added that it was totally unsuitable for sale to schoolboys or young people, and that no boy would be aware that the pistol was not functioning normally. He said that instructions ought D to be given that the fouling should be cleaned out after every 5 shots. He pointed out that there is no cleaning apparatus supplied with the pistol at all. Therefore, in my view, the pistol sold along with the ammunition did constitute a thing dangerous in itself in the hands of E Alexander, a boy of 12 years of age. Further, the sale of the blank cartridges to Alexander was unlawful. The Firearms Act, 1937, s. 11, forbids the sale of firearms or ammunition to any person who does not produce the requisite certificate. Of course, Alexander had no certificate. Sect. 19 provides as follows :

(1) No person under the age of 17 years shall purchase or hire any firearm or F ammunition, and no person shall sell . . . any firearm or ammunition to any other person whom he knows or has reasonable ground for believing to be under the age of 17 years.

Of course, Alexander was obviously not more than 11 or 12 years old.

It is not suggested that this pistol was a firearm within the Act, but G it is said that the ammunition is. The definition of ammunition is in sect. 32, but, as is not infrequently the case, it carefully avoids the task of defining. To say that ammunition means ammunition, of course, is not very helpful :

"Ammunition" . . . means ammunition for any firearm as hereinafter defined, H and includes grenades, bombs and other like missiles, whether capable of use with such a firearm or not, and prohibited ammunition. . . .

If the matter rested there, one would be in grave difficulty, I imagine, in deciding whether blank cartridges were ammunition. However, in catalogues—I think two catalogues were produced to me—blank

cartridges are described as ammunition. I do not know whether that is very relevant, however, for to my mind the point that settles this is found in sect. 16 (2), which provides as follows :

This part of this Act applies to all ammunition as defined in sect. 32 of this Act, except the following articles . . . (c) blank cartridges not exceeding 1 in. in diameter.

- A In other words, blank cartridges of the kind sold in this case are, for the purposes of that part of the Act, taken out of the definition. You cannot take out something that is not there, and that seems to make it clear that the definition of ammunition is intended to cover blank cartridges. The sale of the ammunition in this case, therefore, was contrary to law. I should imagine that the object of that provision forbidding the sale of ammunition to boys, was for the protection of the public, or, at any rate, their companions, people who might reasonably be expected to be in their proximity. Therefore, in this case you have the sale of a pistol and ammunition which together, in my opinion, constituted something dangerous in themselves, and which, as to the ammunition, was a sale forbidden by law.

- D It is unnecessary to decide whether the illegal sale of the ammunition would in itself support this claim. That contention will remain open to the plaintiff if I am wrong in my view that the defendants are liable in this case because they have sold a child something dangerous in itself, and something which never ought to have been put into the hands of one so young, and the illegal sale of the cartridges certainly does not make the case any better. The special damages are agreed at £12 17s. 6d., and I award in all £1,012 17s. 6d. damages.

- E *Fay* : The provisions as to costs in poor person's cases are somewhat special. I refer your Lordship to R.S.C., Ord. 16, r. 31B (1). The first part of r. 31B provides for the usual order, if I may so call it, in poor persons' cases—namely, an order that the defendant do pay out-of-pocket expenses to the poor person plaintiff. The rule provides :

- F The court or a judge may order the out-of-pocket expenses of a poor person to be paid by any other party. Where such an order is made it shall be deemed to include all out-of-pocket expenses properly incurred in the course of the proceedings, but not office expenses, or fees to counsel, or court fees.

- G That, as I understand it, is the usual order which is made in these cases, but I should like to go on and draw your Lordship's attention to the succeeding two paragraphs. Rule 31 (B) (2) provides as follows :

- H Where it appears to the court or a judge that any other party has acted unreasonably . . . or that the special circumstances of the case require it, the court or judge may order the other party to pay the costs of the poor person, including profit costs, or a proportion of profit costs, or a sum of money in respect thereof, in addition to out-of-pocket expenses properly incurred in the course of the proceedings, but not fees to counsel or court fees.

Burt : It is most unusual to receive costs in poor persons' cases. Solicitors, and, indeed, counsel, of course, undertake these duties without any regard to their recovering costs. I respectfully suggest to your Lordship that it is a most unusual order to make in the absence of some circumstances under para. 2.

ATKINSON, J. : There are also the words : " such length or difficulty."

Burt : With great respect, although this case lasted over a day, there was nothing unusual about it. My learned friend, may be, had a difficult matter to argue before your Lordship, but, as far as the preparation of the case was concerned, it was a perfectly simple and straightforward case. The medical evidence was agreed, and there was one expert. That was all which was involved, and I respectfully suggest to your Lordship that there were no special circumstances in this case. If your Lordship did feel inclined to do anything to assist the solicitors at all, I would respectfully suggest that the proper rule to look at is r. 31c, where your Lordship has power, if you think fit, to say that, with regard to the damages recovered, they shall bear a certain sum to assist the solicitors. If your Lordship did think that there was any reason for departing from the ordinary rule, I would suggest some such order as that. Your Lordship could say that some portion should be set aside to bear, if your Lordship thinks fit, out-of-pocket expenses, or whatever it might be.

ATKINSON, J. : I order the out-of-pocket expenses to be paid by the defendants, and, under r. 31b (3), I order that £20 profit costs be paid by the defendants to the solicitors, and, under r. 31c, I order a further £30 to be paid to the solicitors out of the damages recovered by the boy. I think that, as the plaintiff is getting £1,000, it is only right that he should pay something to the solicitors who have been prepared to run the risk of these proceedings. I think that that is not an unfair order. I think that this was an exceptional and a difficult case. At any rate, it was to me. Expert evidence had to be obtained, and the case was well worked up. The solicitor had taken the trouble to take the boy down to Minehead in order to make quite certain of the premises. I think that it does come within that rule. Of course, the out-of-pocket expenses will not include any office expenses or counsel's fees or court fees. The major thing, in my mind, is Major Pollard's fee. That should be an out-of-pocket expense. I think that they should pay that, and I think that the solicitor ought to get £50, £20 from the defendants and £30 from the boy.

Solicitors : *Butt & Bowyer*, agents for *Rutter & Rutter*, Wincanton (for the plaintiff); *Sewell, Edwards & Nevill*, agents for *Newbery & Thorne*, Minehead (for the defendants).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

SHAW v. SHAW.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
March 27, April 3, 1939.]

Divorce—Desertion—Agreement at time of marriage to live apart—Subsequent requests by the petitioner to cohabit—Unreasonable refusal.

The petitioner was married to the respondent in 1930, but the parties agreed to live apart until the respondent could obtain work and be in a position to set up a home. The marriage was never consummated and there was no cohabitation of any kind. Shortly after the marriage, the respondent obtained employment, and the petitioner asked him to make a home for her, offering to contribute to their expenses out of her own income, but he refused. She asked him again in 1931, repeatedly from 1932 to 1934, and again in 1938, but he still refused so to do. The wife thereupon brought this petition for divorce, alleging desertion for at least 3 years immediately preceding its presentation:—

HELD: the petitioner could only be said to have assented to a short period of non-cohabitation, and any reasonable limit to such period was reached when the husband first refused to set up a home. From that time on, he had deserted his wife, and she was, therefore, entitled to a decree *nisi*.

[EDITORIAL NOTE.] The difficulty in establishing desertion in this case arose from an agreement between the parties, made at the time of the marriage, that there should be no cohabitation until the respondent should be successful in finding work and should be in a position to make a home. The marriage was in fact never consummated, but these facts did not prevent a finding of desertion where the husband had persistently refused to set up a home.

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-658, paras. 964-967; and FOR CASES, see DIGEST, Vol. 27, pp. 306-316, Nos. 2837-2939.]

Cases referred to:

- (1) *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694; 27 Digest 307, 2845; 38 L.J.P. & M. 14; 19 L.T. 575; *subsequent proceedings* (1874), L.R. 3 P. & D. 136.
- (2) *Bradshaw v. Bradshaw*, [1897] P. 24; 27 Digest 554, 6086; 66 L.J.P. 31; 75 L.T. 391.
- (3) *R. v. Leresche*, [1891] 2 Q.B. 418; 27 Digest 313, 2910; 60 L.J.M.C. 153; 65 L.T. 602.
- (4) *Mahoney v. M'Carthy*, [1892] P. 21; 27 Digest 566, 6247; 61 L.J.P. 41.
- (5) *Smith v. Smith* (1888), 58 L.T. 639; 27 Digest 313, 2908.
- (6) *Sifton v. Sifton*, [1939] 1 All E.R. 109; Digest Supp.
- (7) *De Laubenque v. De Laubenque*, [1899] P. 42; 27 Digest 306, 2837; 68 L.J.P. 20; 79 L.T. 708.
- (8) *Buckmaster v. Buckmaster* (1869), L.R. 1 P. & D. 713; 27 Digest 311, 2888; 38 L.J.P. & M. 73; 21 L.T. 231.

UNDEFENDED PETITION by wife for dissolution of the marriage on the ground of desertion for at least 3 years immediately preceding the presentation of the petition. There had been no cohabitation between the parties, and the question was whether or not, in those circumstances, the respondent could be said to have been guilty of desertion.

Victor Williams for the petitioner.

SIR BOYD MERRIMAN, P. : In this case, the wife's evidence showed that the marriage had not been consummated, that there had been no cohabitation of any kind, and that—in the first instance, at any rate—she had consented to this state of things. There was no charge of wilful refusal to consummate the marriage, nor was any evidence directed specifically to this aspect of the matter. As there is no authority, so far as I am aware, directly in point, I adjourned the case for further consideration. Having now had an opportunity of considering the authorities to which Mr. Williams, at my request, has since referred me, I have come to the conclusion that it is unnecessary to call for further argument before giving judgment. A

I find the facts to be as follow. The parties were married on Apr. 4, 1930, having known each other for some 4 years. The wife was living with her mother, but she had an income of her own, amounting to about £250 per annum. At the time of the marriage, the husband was not in work, and for this reason he suggested that they should continue to live with their respective parents, and that, until he was earning money, the marriage should be kept secret from the parents. The wife assented to this suggestion, but I believe her evidence that she assented expressly upon the footing that this arrangement should last for a short time only. Not long after the marriage, the husband became employed at £4 per week. Thereupon the wife asked him to set up house, and offered to contribute to the expenses out of her own income. The husband, however, refused, on the pretext that he wished to be entirely responsible for keeping up the matrimonial home, and that he was not then in a position to do so. In Oct., 1930, the wife accompanied her mother to India, still concealing the fact that she was married. She returned to England in May, 1931, and again pressed the husband to make a home for her. He was then unemployed, and again refused to do so. Thereupon, the wife returned to her mother in India. Between their return to England in July, 1932, and 1934, the wife repeatedly pressed her husband to make a home, but he always refused to do so. From the last of these requests, in 1934, until 1937, the spouses never even met, and it was not until the latter year that the wife first told her mother about the marriage. I gathered that it was the publicity given to the passage of the Matrimonial Causes Act, 1937, which led to her making the disclosure then. Eventually, on Sept. 19, 1938, the wife wrote a letter to the husband, on her solicitor's advice, referring to her previous requests that they should live together on what means they had, and to his refusals, and making a final demand that he should make a home so that they could live together in the ordinary way as husband and wife. If he would not do so, she said, she must apply for her freedom. In reply, she received a telegram to the effect that the husband did not intend to do anything. B C D E F G H

From this statement of the facts, it will be seen that this case affords yet another example of the difficulty created by the judgment

of LORD PENZANCE in *Fitzgerald v. Fitzgerald* (1). At p. 698, he says :

No one can "desert" who does not actively and wilfully bring to an end an existing state of cohabitation.

A It has often been explained that the passage from which this extract is quoted cannot be taken to be exhaustive. In *Bradshaw v. Bradshaw* (2), a judgment of the Divisional Court, SIR FRANCIS JEUNE, P., in explaining the limitations to be placed upon *Fitzgerald v. Fitzgerald* (1) and *R. v. Leresche* (3), said, at p. 27 :

B The two cases cited have one common feature : in each of them there were two persons living separate from each other by mutual consent, and not cohabiting together, and in such a case there clearly could not be desertion unless there were a resumption of cohabitation.

C I do not think, however, that SIR FRANCIS JEUNE, P., was intending to refer to cases in which the parties had agreed to separate only for a limited time, or for some temporary reason. Indeed, in an earlier case, *Mahoney v. M'Carthy* (4), he had dealt expressly with that situation as follows, at p. 25 :

D In the first place, was there any desertion at all ? It is clear that the husband left the country with his wife's consent. That is admitted by the plaintiff's witnesses. It is further, indeed, urged on behalf of the husband that the case of *Fitzgerald v. Fitzgerald* (1) shows that there must be a resumption of cohabitation before there can be desertion. I cannot, however, agree that that is so, because though it may be perfectly true that if there has been a separation by consent, that is to say, an agreement to live separate, there cannot be desertion without a return to cohabitation, such a rule does not apply where the absence has not been in pursuance of an agreement to live separate, but merely for a temporary reason and amounting only to a temporary separation.

E It is clear from this case, and from *Smith v. Smith* (5) and *Sifton v. Sifton* (6), that, if cohabitation has ceased by agreement only for a limited time, or for a particular reason, that spouse is guilty of desertion who, without excuse, refuses to resume cohabitation at the expiration of the time or the cessation of the reason for the separation. It is also settled
F by *De Laubenque v. De Laubenque* (7) that a spouse may be guilty of desertion, in spite of the fact that the marriage has not been consummated and that cohabitation has never begun, if that state of things is brought about by his or her fault. In *Buckmaster v. Buckmaster* (8), the wife
G failed, in similar circumstances, only because she had bargained away her rights for a money consideration. It seems to me to follow that a spouse who, without excuse, refuses to commence cohabitation after the expiration of an agreement merely to postpone its inception can also be guilty of desertion. I think that that is the case here. Although the wife might, probably, have brought matters to a head by an earlier
H disclosure of the situation to her mother, and would have been on surer ground had she done so, I think that the true position is that, at the most, she assented to the non-cohabitation for a short period only, and that any reasonable limit of such period was reached when the husband first refused to make a home, though he was earning money and she was willing to contribute to their joint expenses out of her own income. From that

time, I think that the husband began to desert the wife, and continued to do so in spite of her requests for a home and a proper married life. It is true that for considerably more than 3 years before the presentation of the petition the wife had ceased even to make these requests, and that the spouses had ceased to meet. I do not think, however, that it would be right to draw the inference that she ever acquiesced in the husband's refusal of her demands. Her failure to take steps to enforce her rights is, I think, explained by the fact that, having regard to her evidence as to the monetary position, any proceedings with the ultimate object of obtaining maintenance would necessarily have been fruitless. For these reasons, I think that the wife has proved her case, and I pronounce a decree *nisi* accordingly.

Decree nisi granted.

Solicitors: *Withers & Co.* (for the petitioner).

[Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

EMCEE, LTD. v. SUNDAY PICTORIAL NEWSPAPERS (1920), LTD.

[KING'S BENCH DIVISION (Singleton, J.), **March 24, 1939.**]

Practice—Payment into court—Two causes of action—No apportionment.

Practice—Costs—Trial with jury—Award of one farthing damages—R.S.C., Ord. 22 r. 1 (2).

In an action for libel in which two defamatory matters were complained of, a sum of £50 was paid into court with a denial of liability. No application was made to the court under R.S.C., Ord. 22, r. 1 (2), to make a general payment in in respect of the two causes of action. The jury returned a verdict for the plaintiffs and awarded 4d. damages in respect of each of two defamatory matters. It was contended that the plaintiffs ought to pay the defendants' costs, because the verdict showed that the jury took the view that the action ought never to have been brought:—

HELD: (i) the payment into court was a bad payment in, since it was a payment of one sum in respect of two causes of action, and no application was made to the court to allow a general payment in.

(ii) there should be no order as to costs.

[EDITORIAL NOTE.] This decision emphasises the rule that in general a payment into court must be apportioned as between separate causes of action. The court may, however, under R.S.C., Ord. 22, r. 1 (2), make an order for a general payment in, and it is clear that, where there is more than one cause of action, the defendant should either apportion the sum paid in or make an application under the rule.

AS TO PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 62-64, paras. 100-107; and FOR CASES, see DIGEST, Practice, pp. 479-484, Nos. 1591-1637. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 363-367.]

Cases referred to:

(1) *Weber v. Birkett*, [1925] 2 K.B. 152; Digest, Practice, 484, 1627; 94 L.J.K.B. 767; 133 L.T. 598.

(2) *Smith v. Schilling*, [1928] 1 K.B. 429; Digest, Practice, 484, 1628; 97 L.J.K.B. 276; 138 L.T. 475.

(3) *Barber v. Pigden*, [1937] 1 K.B. 664 ; [1937] 1 All E.R. 115 ; Digest Supp. ; 106 L.J.K.B. 858 ; 156 L.T. 245.

(4) *Poliakoff v. News Chronicle, Ltd.*, [1939] 1 All E.R. 390 ; Digest Supp.

ACTION for damages for libel. The facts are fully set out in the judgment. The case is reported here on the question of costs alone.

A *Sir Patrick Hastings, K.C.*, and *F. W. Beney* for the plaintiffs.

W. Norman Birkett, K.C., and *John Senter* (*Valentine Holmes* with them) for the defendants.

B SINGLETON, J. : The plaintiffs, the proprietors of a club, claim damages for libel against Sunday Pictorial Newspapers (1920), Ltd. The writ was issued on Mar. 29, 1938, and it claimed :

. . . damages for libel contained in a photograph and certain letter-press appearing in an issue of the SUNDAY PICTORIAL, dated Mar. 20, 1938.

C When the statement of claim was delivered, para. 2 set out the article in the issue of the SUNDAY PICTORIAL, dated Mar. 20, 1938, of which the plaintiffs complained. That article contained these words, among others :

Murray's Club, London, had the audacity to stage a grim show like this—to entertain the public ! We pray that London will never be insulted by such a vile and atrocious breach of decent taste again.

D Alongside the article there was a photograph of certain girls in gas-masks. Para. 3 of the statement of claim alleged that the plaintiffs were also defamed by the defendants on Mar. 20, when the defendants falsely and maliciously printed and published of the plaintiff company, and of and concerning the plaintiff company, a poster in the following terms :
E “ Shocking Cabaret Joke ! ” It is quite clear that there were two causes of action alleged in the statement of claim, which, in that sense, is wider than the writ, but no point was taken upon that.

F On May 12, 1938, the defence was delivered. It denied the innuendo, and also pleaded that, in so far as the words consisted of statements or representations of fact, they were true in substance and in fact, and continued as follows :

. . . in so far as they consist of expression of opinion [they] are fair comment made in good faith and without malice upon the said facts which are matters of public interest.

G On Dec. 20, 1938, the defendants made a payment into court of £50 generally, with a denial of liability. At the trial of the action, the jury returned a verdict for the plaintiffs for $\frac{1}{4}d$. damages in respect of each of the alleged defamatory matters.

H It is true to state, as counsel for the defendants said, that the conduct of the action before me was really such as it would have been if there had been but one cause of action. The poster was mentioned, but that point was not seriously argued, nor was any submission made with regard to it. If it had been considered separately, it might not have been held to be defamatory of the plaintiffs in the action, but that does not affect any question I have to decide now.

The jury having returned a verdict for the plaintiffs in respect of each cause of action, the plaintiffs ask that there shall be judgment for them for the sum of $\frac{1}{2}d$. Sir Patrick Hastings, on their behalf, does not ask me, in the circumstances, to order that the defendants pay the costs of the plaintiffs. Mr. Norman Birkett, on behalf of the defendants, submitted that there was a payment into court of £50—it is true that it was a payment into court with a denial of liability, but still it was a payment in—that that fact ought to be regarded, and that, in any event, I ought to order the plaintiffs to pay the defendants' costs. He submitted that on two grounds, (i) because there was that payment into court of £50, and (ii) because the verdict of the jury, and some question which the foreman of the jury put when they returned for further instruction, showed that their view was that this action ought never to have been brought.

As to the payment into court, several authorities have been cited to me, and those which are of most use, in my view, are *Weber v. Birkett* (1) and *Smith v. Schilling* (2). Both those cases were decided in the Court of Appeal before the rule dealing with payments into court was altered, but the effect of them is that, where there are two causes of action and one general payment into court, that payment into court is not good. That was stated by BANKES, L.J., in *Weber v. Birkett* (1), at p. 154:

The defendant, in the first instance, paid into court one sum of £105 as sufficient to satisfy both claims. It is in my opinion well established by the authorities that that was not a good plea.

Later in his judgment, BANKES, L.J., dealt with the same point. In the later case of *Smith v. Schilling* (2), the same is said by SCRUTTON, L.J., at p. 438:

I have come to the conclusion that it is not law, and that a plea of payment of one sum into court in respect of different causes of action put in suit by different plaintiffs is a bad plea and ought to be struck out.

I have no doubt that the difficulties of defendants in cases of this kind were pointed out on many occasions, and that that led to an alteration of the rule. The present R.S.C., Ord. 22, r. 1, came into existence in 1933, and was amended in 1934, and R.S.C., Ord. 22, r. 1 (2), is now in this form:

Where the money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the cause or causes of action in respect of which payment is made and the sum paid in respect of each such cause of action, unless the court or a judge otherwise order.

It follows that, in a case of this kind, where there are two causes of action, it is open to the defendant who desires to pay money into court to apply to the court in order to be allowed to make a general payment in, and the court may allow such a payment in or may put the defendant upon terms of some kind. In the present case, no such application was made, but a sum of £50 was paid into court generally, there being two causes of action. I think that, in view of the decisions which have been cited to me, and in view of the express terms of R.S.C., Ord. 22, r. 1 (2), I am

bound to hold that that payment into court was bad. It was, as Sir Patrick Hastings contended, a nullity.

A The argument of Mr. Birkett on this part of the case was based largely upon the decision of *Barber v. Pigden* (3). I do not think that that case affects this particular point. It does deal with what may happen, and what ought to happen, if, there being more than one cause of action, counsel at the trial treat them all as one, but it does not in any sense consider the rule with regard to payment into court which I have already mentioned.

B In those circumstances, the payment into court being bad, the question is as to what order ought to be made. I ought to add that I do not regard *Poliakoff v. News Chronicle, Ltd.* (4), a case recently decided in the Court of Appeal, as really giving any help on this particular point. Mr. Birkett submitted further, as his second point, that, even though the payment into court should be held to be a nullity, still the circumstances were such
C that the defendants ought to be given the costs of the action. He said that the question put by the jury showed that they had really decided this case upon the fact that, though the performance was not staged, it was ready to be staged, and their verdict showed, he submitted, that their view was that the action ought not to have been brought. The
D real answer to that point, it seems to me, is that the jury have found that the alleged facts on which the comment was based were not truly stated in the article, and it may be right to say that, if the jury can be regarded as indicating that the action ought not to have been brought, so also, by their verdict, they may have said that this comment ought
E not to have been made, because it was made on facts which were not facts truly stated. The argument seems to me to cut both ways. In the circumstances, I think that the right order to make is that there should be no costs on either side. There will thus be judgment for the plaintiffs for $\frac{1}{2}d.$, and an order for the payment out to the defendants of £50.

F Solicitors: *Freke Palmer, Romain & Romain* (for the plaintiffs); *Michael Abrahams, Sons & Co.* (for the defendants).

[Reported by CHARLES NEWTON, ESQ., Barrister-at-Law.]

G BENNETT v. BENNETT (BY HER GUARDIAN).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **March 21, April 3, 5, 1939.**]

H *Divorce—Desertion—Insanity—Certification of deserting spouse—Presumption against rationality on subject of cohabitation—Whether statutory period interrupted.*

Upon this petition, presented on Apr. 26, 1938, it appeared that the parties were married in 1901 and that the wife deserted the husband in 1905. In Dec., 1936, the wife was certified as insane. There was medical evidence that she was not capable of forming any reasoned judgment on the question of desertion:—

HELD: the insanity raised a presumption that the wife was no longer

capable of forming a reasoned judgment on the matter of her relations with her husband. This presumption might be rebutted by proof that she still retained a rational intention to desert her husband, but, in the circumstances, there was no such proof, and no decree could be granted.

[EDITORIAL NOTE.] The present case is very similar to that of *Williams v. Williams*, [1939] 2 All E.R. 13; Digest Supp., but the matter is carried a step further in that it is shown that the suspension of desertion by reason of the supervening insanity is a rebuttable presumption. The mental disease may be such that the patient is still capable of forming a rational intention to desert a spouse, although on other matters he or she may have such delusions that he or she is rightly certified as insane. A

AS TO DIVORCE ON THE GROUND OF DESERTION, see HALSBURY, Supp., Divorce, para. 971; and FOR CASES, see DIGEST, Vol. 27, p. 319, Nos. 2974-2977.] B

Cases referred to :

- (1) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 27 Digest 76, 601; 89 L.J.K.B. 1161; 124 L.T. 23. C
- (2) *Thomas v. Thomas*, [1924] P. 194; 27 Digest 315, 2925; 93 L.J.P. 61; 130 L.T. 716.
- (3) *Bowron v. Bowron*, [1925] P. 187; 27 Digest 561, 6168; 94 L.J.P. 33; 132 L.T. 773.

PETITION by husband for dissolution of marriage on the ground of desertion. The partners were married in July, 1901. The wife finally deserted the husband in 1905. In Dec., 1936, she was certified insane, and continued to be detained in a mental hospital. D

J. Roland Adams for the petitioner.

Theodore Turner for the respondent. E

BUCKNILL, J.: In this case, the petitioner, William Bennett, petitions for dissolution of his marriage to May Gertrude Bennett on the ground that she has deserted him without cause for a period of at least 3 years immediately preceding the presentation of this petition. The petition was presented on Apr. 26, 1938. On Aug. 26, 1938, the respondent, by the Official Solicitor, her guardian *ad litem*, filed an answer denying that she had deserted the petitioner as alleged in the petition. F

The facts of the case material to this inquiry are these. On July 16, 1901, the petitioner married the respondent. There is one child of the marriage, born in 1902, and, according to the evidence of the petitioner, the wife left the home and went to her parents on several occasions before she finally left him in Dec., 1905. He said that she had always wanted to get away, and that after 1905 he saw her, I think, on one occasion only, when she said that she did not care in the least. She was, in fact, ill at the time. To corroborate his evidence, the husband called his son by an earlier marriage, who said that, before the wife left, she was not satisfied with her husband, though there was no reasonable ground for dissatisfaction. After she left, there was some attempt at a separation agreement, but it fell through, and the husband paid nothing G
H

for his wife's maintenance until she was certified insane in Dec., 1936. For 31 years, the evidence establishes, and I accept the evidence of the petitioner, who gave his evidence well, the wife deserted the husband.

The difficulty in the case is that the statute only gives the petitioner a right to have his marriage dissolved if he satisfies the court that his wife has deserted him without cause for at least 3 years immediately preceding the presentation of the petition. For 18 months before the petition was presented, the wife was in a mental hospital and was certified as insane. That, of course, places the court, to start with, in a difficulty, because the court has to be satisfied on the evidence that the case has been proved, and it is a little difficult to see how the court can be satisfied when one of the parties is unable to appear here and give her version of what happened in relation to the withdrawal from the matrimonial home. I do not know that that is necessarily conclusive of the matter, but it does place the court in a difficulty. Moreover, there is a case, which has been embodied by LANGTON, J., in another case very similar to this, which counsel for the petitioner, who put forward a most careful and courageous argument, had to fight to get over—namely, *Jones v. Newtown & Llanidloes Guardians* (1). It is quite true, as counsel for the petitioner pointed out, that that was not a case in which the point to be decided by the court was whether or not the wife had deserted the husband without cause for the 3 years necessary to give him the right to a decree, because in 1920 there was no right in this country to get a decree of dissolution on the ground of desertion. In *Jones'* case (1), the point decided by the Divisional Court was whether or not a husband who had been deserted by his wife was liable to support her after she had become certified as a lunatic. The language used by EARL OF READING, L.C.J., in that case seems to apply to the present case in principle. He said, at pp. 384, 385 :

... the relief of the husband from the obligation of maintenance continues only so long as she voluntarily remains absent. Her absence, although wrongful, does not affect the relationship of husband and wife. She is entitled after however long a period of absence to return at any time. There is in the present case no suggestion of the wife having misconducted herself in the sense of having committed adultery. She simply left her home and lived apart. Suppose she were to recover from her insanity and elect to return, it seems clear that the husband would be bound to maintain her. Nothing has happened to dissolve the relationship of husband and wife. Here the wife has become a lunatic and continues to be insane. She is therefore unable to exercise any judgment. She cannot elect to return home, and while in that condition she becomes chargeable to the union. In those circumstances who ought to support her—the ratepayers or the husband? I think the answer is that so long as the relationship of husband and wife continues it is the husband.

Counsel for the petitioner, if I understood his argument correctly, took two points. He said, first of all, that the basis of the judgment in *Jones'* case (1) was that the wife was entitled to elect to return at any time during the desertion, and that, that being so, the husband remained liable to maintain her during the time she was insane and unable to form a rational election of that kind. He said, however, that in the present case the wife had behaved in such a way to her husband—by deserting

him on several occasions shortly after the married life had started and finally staying away from him whilst sane for 31 years—that he would be entitled to take the point that she had put herself, so to speak, outside the pale of repentance, that she could not be heard to say now, after all these years, that she wanted to return to her husband, and, therefore, that the question as to her right to elect to return did not arise in this case. That of course, is a question of fact. In support of his argument, he cites *Thomas v. Thomas* (2) and *Bowron v. Bowron* (3). In each of those cases, the husband had been cruel to the wife and had behaved to her in such a way that she had been forced to leave him. In *Thomas'* case (2), which is perhaps the most helpful to the petitioner, there is evidence that the husband, after the wife had left him on good grounds, made serious efforts to get her back, and the court held that, notwithstanding the husband's efforts to get her back, and notwithstanding his protestations of repentance, the wife was entitled to refuse to return to him. As SIR E. M. POLLOCK, M.R., pointed out in that case, at p. 199 :

That conduct is not necessarily wiped out by a letter of invitation to the wife to return. It must be for those who hear the whole evidence to decide whether the conduct amounting to desertion is no longer to be regarded, so that there is no excuse for the refusal of the other spouse to return.

In the present case, there was certainly no question of cruelty or anything of that kind, and on the petitioner's own case there was nothing, so far as I can see, which precluded the wife from forming an honest intention to return at any time. If she communicated that intention to her husband, she would then cease to be in a state of desertion, so far as she was concerned. I do not think it necessarily follows that, after 31 years of desertion, the court will order a husband to take his wife back if a suit for restitution of conjugal rights was commenced by her, but that seems to me to be rather a different point. I cannot see why the wife should not at any time during those 31 years take herself out of the category of desertion by forming an honest intention to return and by communicating that intention to her spouse.

The second point which counsel for the petitioner took was that *Jones'* case (1) goes too far, and that, if the court intended to lay down an absolutely hard-and-fast rule that in no circumstances could a person once certified as insane retain an intention to desert, it went too far. It seems to me that in this case the question is one of fact, and can be stated in this way : Did the wife, during the time she was insane, intend to desert her husband, and, if so, was such an intention based on a rational view of the material circumstances ? It may be that the judgment of the Divisional Court in *Jones'* case (1) did not intend to lay down any such hard-and-fast rule as may be implied at first from the very wide words which were used. It may be that the fact of the wife's insanity does not in itself raise an irrebuttable presumption of law that, after becoming insane, she is at all times unable to form a rational intention to live apart from her husband. Although insane on certain well-defined subjects,

she may remain sane on the subject of whether, in her view, cohabitation with her husband is tolerable to her. The view that cohabitation was not tolerable she held for 31 sane years of her life, and presumably that view was based on her dislike for married life with her husband. Moreover, such an irrebuttable presumption makes no allowance for the fact

A that the wife may have frequent and prolonged lucid intervals during which she steadily refuses to listen to the importunings of her husband to return to cohabitation. Desertion is a continuing offence, and, when the wife formed the intention to desert, and acted upon it, the intention remained, and, in my view, is presumed to continue until the wife proves

B a sincere desire on her part to return to cohabitation and make a reasonable effort to act upon such a change of mind.

In this case, since the wife, after deserting her husband for 31 years, was eventually certified as insane, it seems to me that such insanity raises the presumption that she was no longer capable of forming any

C reasoned judgment on the matter of her relations with her husband. When she became insane, her intention to desert came to an end, unless it is proved that, although she was certified as insane, on the question of cohabitation with her husband she remained capable of forming a reasoned judgment. In other words, after the wife has been certified

D as insane, the burden of proof that she retains a rational intention to desert her husband rests on the petitioner. At that point, the doctor in whose care the respondent is was called as a witness before me. He said that he communicated the contents of the petition to the respondent. That was not done because, in his view, he thought that she was of a

E necessity in a fit state to receive it. It was done because it is the practice in every case to do so unless the procedure will do some harm to the state of mind of a patient. The doctor said that the wife appreciated the purport of the document, and said that she did not give a damn as long as there was no slur on her character. She had never been in

F any mental home before she came to that institution in Dec., 1936. Later on, the doctor saw her again, and asked her if she could remember what had happened about it, and she said that she had forgotten. Then she remembered, and became very abusive. The doctor continued as follows :

G I asked her if she wished to return to her husband—that is, before I served the petition—and she said that she did not wish to return. Her mental disorder is caused by excessive alcohol. She is not capable of forming any reasoned judgment. She is still certifiably insane. She suffers from gross disorder of memory, and her emotions varied in an irrational way.

On the rule which I venture to think is applicable in a case of this kind,

H in my view, the husband has not discharged the burden of proof that, after the wife had become insane, she had continued to exercise a reasoned judgment, or had been able to form a rational intention, as to cohabitation with her husband, and therefore she cannot be said to have deserted her husband during the period of her insanity—namely, from Dec., 1936, to May, 1938, when the petition was presented.

This is, in my view, a hard case, and, if I could see my way to grant a decree, I would gladly do so, for the wife, whilst sane, in fact deserted her husband for 31 years. Moreover, the reasoning which leads me to refuse a decree would apply if a wife after those 31 years had been certified as insane for a week, or even a day, before the petition was presented. The words of the statute are too plain. Before a decree of dissolution for desertion can be granted, there must be desertion for 3 years immediately preceding the presentation of the petition. If these plain words cause cases of hardship, then it is for Parliament to amend the law. A

Petition dismissed with costs. B

Solicitors: *Clapham, Fraser & Williams* (for the petitioner); *Official Solicitor* (for the respondent).

[Reported by J. F. COMPTON MILLER, Esq., *Barrister-at-Law.*] C

CLARK v. CLARK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
March 10, 21, 1939.]

Divorce—Desertion—Separation deed—Husband's failure to perform covenant to pay—Covenant enforced to judgment—No repudiation of deed D

The petitioner, who had been living unhappily with her husband for several years, reluctantly entered into a deed of separation, receiving at the time no professional advice. The husband paid under the deed for some considerable time, and, upon his failure to continue to do so, the wife in 1935 sued upon the deed in the county court. The judgment proved unproductive. In Sept., 1938, when the husband was served with the petition in this suit, in which the petitioner alleged desertion for more than 3 years, he said that he had no intention of maintaining his wife again, and would be glad to be rid of her :— E

HELD : upon these facts, the husband's intention to desert was not proved, and it was impossible to find desertion for a period of 3 years immediately preceding the presentation of the petition. F

[EDITORIAL NOTE.] It will be remembered that in *Pardy v. Pardy*, [1939] 2 All E.R. 258; Digest Supp., it was said that the repudiation of a deed of separation must be accepted by the other party. Here the wife cannot be said to have accepted the suggested repudiation of the deed by the husband, since she brought an action upon the deed, and was, therefore, trying to enforce it. It was suggested that the words used by the husband when service of the petition was effected were evidence of an intention to desert at that time, and that that intention might be related back for the necessary period of 3 years. It will be noticed that this period of 3 years would have commenced about the time when the wife was suing upon the deed. Having regard to all these matters, the court has found it impossible in this case to treat the deed as a mere sham and to disregard its effect upon the fact of desertion. G

AS TO SEPARATION DEEDS AND DESERTION, see HALSBURY, *Hailsham Edn.*, Vol. 10, p. 657, para. 966; and FOR CASES, see DIGEST, Vol. 27, pp. 317, 318, Nos. 2940-2956.] H

Case referred to :

(1) *Norman v. Norman*, (1939), Unreported.

UNDEFENDED PETITION by wife for dissolution of marriage on the ground of alleged desertion for a period of at least 3 years immediately preceding the presentation of the petition. The parties were married in 1918. In 1933, they entered into a deed of separation which provided, *inter alia*, that they should live separate and apart, and that the husband should

- A pay to the wife 35s. per week for her maintenance. In 1935, the husband made default in payment, and the wife sued to enforce the covenant to pay under the deed, recovering judgment. It was contended on behalf of the wife that since Aug. 22, 1935, the husband had repudiated the deed, had refused to make any payments thereunder, and had deserted her.
- B *G. C. Tyndale* for the petitioner.

HENN COLLINS, J. : The material facts of this case can be shortly stated. For some years the parties had been living unhappily. The husband had taken to drink, and to staying out to all hours of the night

C or the small hours of the morning, and, when the petitioner complained, he said that, if she did not like it, they had better split. The petitioner did not want a separation, and would not have consented to part from her husband if he had been willing to pull himself together. However, reluctant though she was to separate, she came to the view that, things

D being as they were, it was the best course. The husband, a clerk in a solicitor's office, then prepared a deed of separation, and an appointment was made at the office of a solicitor with whom the husband had a professional acquaintance, for the signature of the deed. That solicitor was not asked, and did not take it upon himself, to advise the wife upon

E the matter, but he recognised that 30s. per week, which the husband proposed to allow his wife, was too little, and persuaded the husband to make it 35s. per week. This amount he inserted in the deed in the blanks left for that purpose, and the deed was signed by both parties, whereupon the spouses parted.

- F In those circumstances, I am invited to say that the deed was a mere sham on the husband's part, or that it was obtained by duress, and I am asked to disregard it and to say that desertion began from the moment when it was signed. I do not think that that is the proper view, upon the facts, for the husband paid for some considerable time, albeit irregu-
- G larly and under pressure from his solicitor friend, and the wife eventually put the deed in suit. Having done so, she cannot now turn round and disavow it as her deed.

- By Feb., 1935, the husband had fallen into arrears with his payments, and owed his wife £19. For this amount she sued in the county court,
- H and recovered judgment. The judgment, however, proved unproductive. The husband did not pay, and the wife issued a judgment summons. This summons was not served, because the husband had left the district, and he has paid nothing since. Had there been desertion by the husband at that stage? There is nothing, in my view, from which desertion can be inferred, except the mere non-payment. The courts have been slow to

regard a mere non-payment, even when a money payment was at the root of a contract, as evincing an intention not to be bound by the contract, for, unless the withholding of payment is wilful, it has no significance in this relation. I am not satisfied that it was wilful, but, even if I were satisfied, it is clear that the petitioner did not treat the deed as being at an end. On the contrary, by putting it in suit and recovering judgment upon it she made a conclusive election to treat it as subsisting. The subsequent unserved judgment summons does not affect the matter one way or the other. The final election had been made as to all the breaches up to the date of the county court plaint by the county court judgment, and the judgment summons was merely a remedy on that judgment, and not upon the deed. The desertion must, therefore, be inferred, if at all, from subsequent events, such as that the husband never communicated with his wife or child before the institution of the suit, nor paid the wife any money, and that, when, in Sept., 1938, he was served with the papers in this suit, he said that he had been expecting this, that he had no intention of maintaining his wife again, and would be glad to be rid of her. A B C

Desertion is, of course, in essence a matter of intention, and, though I should infer from what he said when he was served that he was then, in intention and in law, in a state of desertion, ought I to infer that he had been of that mind for the 3 years next preceding the suit? I think not. D Apart from his words, there is only his failure to pay, which may well have been from mere lack of means, and I can find nothing in his words from which I can obtain any sufficient foundation for the inference that for the past 3 years he had meant to abandon his wife. This disposes of the case, but, as my own decision in *Norman v. Norman* (1) was cited E to me as conclusive of this case, I take occasion to point out that in that case there was ample evidence of intention on the husband's part to repudiate the separation deed and to desert the wife, and the question was whether or not the wife must yet fail for lack of proof that she had accepted the repudiation. In that case, she had not made a conclusive F election at any stage before suit, and I gave my reasons for thinking that the burden of proving acceptance of his repudiation of the deed did not lie upon her.

Petition dismissed.

Solicitors : *Woodcock, Ryland & Parker* (for the petitioner). G

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

AMALGAMATED DENABY COLLIERIES, LTD. v. CHRISTEN.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Macnaghten and Singleton, JJ.), **March 29, 1939.**]

Mines—Coal mine—Statutory regulation of mines—Means of egress—Unsafe airway—Coal Mines Act, 1911 (c. 50), s. 36.

A The respondent, having entered into a written contract of service with the appellants, absented himself from work on the ground that there was no secondary means of egress available as required by the Coal Mines Act, 1911, s. 36. The appellants preferred a summons against him, alleging that he had wrongfully absented himself from, or neglected, the service of the appellants at their colliery, and claiming damages for breach of contract. The appellants contended, *inter alia*, that the only reason for the respondent's failure to work was the refusal of their manager to permit the pit to "play" on two days to entitle the respondent to qualify for unemployment insurance benefit, and alleged that a roadway was available as required by sect. 36 of the Act. The justices found as a fact "that the roadway was a return airway, that it was unsafe as a means of egress, and that in the case of an explosion it would have been filled with poisonous gases, foul air and coal dust, and all men travelling thereon would have been suffocated." They also found that the respondent did not know of the existence of the airway:—

C
Held: as there was no secondary means of exit as required by the Coal Mines Act, 1911, s. 36, the summons was rightly dismissed by the justices.

D [EDITORIAL NOTE. It is the duty of the owners of a colliery to provide proper means of ingress and egress and to make these known to the workmen by means of plans placed in a prominent position. It is probably not essential that the workmen should be actually aware of the position of the means of ingress and egress, provided the plans are properly exhibited. On the other hand, the means of egress must be one which is properly available to the workmen, and not one which it is unsafe to use.

E AS TO OUTLETS FROM MINE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 790, 791, para. 1639; and FOR CASES, see DIGEST, Vol. 34, pp. 742-744, Nos. 1180-1188.]

F APPEAL by way of case stated from a decision of justices for the county of York, sitting at Doncaster. The material part of the case stated was as follows:

The following facts were proved or admitted

G On Apr. 12, 1934, the respondent entered into a written contract of service with the appellants. The contract was contained in the contract book of the appellants. Coalminers in Yorkshire, in accordance with the county agreement, are required to give or receive 7 days' notice in writing to terminate their contracts of service. No written notice to terminate this contract was ever given by the respondent to the appellants. The respondent worked for the appellants at their Denaby Main Colliery up to and including July 6, 1938. During the 7 days immediately preceding July 6, 1938, some men employed at the Denaby Main Colliery had lost 2 days' work. To entitle these men to draw unemployment benefit, it was necessary that they should have had 3 days off work during the preceding 7 days. On July 5, 1938, the winding shaft of the Parkgate seam at the colliery broke down, owing to a defect, and a notice was posted at the pithead stating in the ordinary way that the men in the Parkgate seam would not work until further notice from the company, but that the Barnsley seam (in which the respondent worked) would continue to work the remainder of that week as therein appearing. On Wednesday, July 6, 1938, the secretary of the local branch of the Yorkshire Mineworkers' Association, of which the respondent was a member, attended at the office of the manager of the colliery and asked the manager if he would "play" the pit that day or the following day, in accordance with the usual custom, in order that some men could qualify for unemployment benefit. At the time of the secretary's

request, the men for the afternoon shift on Wednesday, July 6, were then assembling in the pit-yard, ready to go down the pit to work, and the day-shift men were ascending the mine. The appellants' manager refused to allow the pit to "play," and informed the secretary that they must work the remainder of the week in accordance with the notice which he had already posted at the pithead on Tuesday, July 5, 1938. The men who had been engaged on the day-shift had then ascended the mine, and it was then that a rumour commenced that there was only one means of egress available. All the afternoon shift, with the exception of two men, thereupon refused to go down the pit to work. On Wednesday evening a meeting of the members of the Denaby Main branch of the Yorkshire Mineworkers' Association was held, and during the course of the meeting it was suggested by the secretary of the branch that, owing to a breakdown of the Parkgate seam winding engine, there was no secondary exit from the pit, as required by the Coal Mines Act, 1911, s. 36, the men's inspectors under sect. 16 of the Act alleging that the roadway was only travelling for part of its length. The men, including the respondent, refused to work on the morning shift on Thursday, July 7, 1938, and Friday, July 8, 1938, for the reasons stated in the letter, and the appellants alleged damage to the amount of 15s. in consequence of such refusal of the respondent to work on such dates, the amount not being in dispute. The appellants are the owners of adjoining collieries known as Denaby Main Colliery and Cadeby Main Colliery respectively. There is a main return airway from Denaby Colliery to Cadeby Colliery. This has been in existence for many years, and bears a notice board at the Denaby end marked "To Cadeby," but has never been used as a travelling road either by the respondent or by other workmen. On Friday, July 8, 1938, the manager and under-manager of the Barnsley seam, Denaby Colliery, in company with one of His Majesty's inspectors of mines for Yorkshire, Mr. Brown, travelled through the airway from Denaby to Cadeby and the manager and under-manager of the Barnsley seam of the Denaby Colliery gave evidence that the road was then in good order and condition and fit for travelling, while the local secretary of the Yorkshire Mineworkers' Association gave evidence that he had previously found the airway uneven, low and narrow in places, and unfit for travelling. No question was raised on Tuesday, July 5, 1938, either by the secretary or by any other persons, that the road in question was unsatisfactory, or did not comply with the requirements of the Act, but on Wednesday, July 6, 1938, at 1.30 p.m., the allegation that there was no secondary means of egress was made. The main return airway was shown on the statutory plans of the mine kept at the offices of the company, and also on the statutory plan posted at the pithead, and had been travelled four times each year by the management and also on every statutory workmen's inspection of the mine, under the Coal Mines Act, 1911, s. 16, and duly reported upon by such workmen's inspectors, but was unknown to the respondent and untravelling by him. During the time the shaft to the Parkgate Seam was broken down, events may have happened in the mine to prevent the men then working therein from reaching the shaft of the Barnsley seam. The appellants had never made known to the respondent that the main return airway was available as a means of egress from Denaby Pit. The respondent had never travelled along the main return airway, and did not in fact know of its existence. The main return airway from Denaby Pit to Cadeby Pit bottom is $2\frac{1}{2}$ miles long, and to reach the entrance to the main return airway the respondent would have to travel one mile from his working place through workings. In case of an explosion in the mine, gases, foul air and coal dust would be drawn through the main return airway, and, if the respondent and his fellow-workmen sought to leave the mine by that way, they would probably be suffocated. The winding-engine of the Parkgate seam was repaired by Monday, July 10, 1938. The respondent, with the other workmen employed in the Barnsley seam, returned to work on July 10, 1938.

It was contended for the appellants (i) that no notice to terminate the respondent's contract of service had been given; (ii) that the appellants had suffered damage to the amount of 15s.; (iii) that the only reason for the respondent's failure to work on July 7 and July 8, 1938, was the refusal of the manager to permit the pit to "play" on either July 7 or July 8, 1938, to entitle the respondent to qualify for unemployment benefit, and (iv) that the question of the non-existence of a secondary means of egress was not raised until after the respondent had refused to work on July 7, 1938, and that such question was merely an afterthought, and was subsequently tendered as an excuse for the failure of the respondent to carry out his contract of service.

It was contended for the respondent (i) that the question of unemployment benefit had nothing to do with the refusal of the respondent to descend the mine to work; (ii) that the respondent was ready and willing to work under safe conditions, and raised the question of the secondary means of egress from the mine on July 6, 1938; (iii) that at the material time there was no secondary means of

egress available from the Barnsley seam, as required by the Coal Mines Act, 1911 ; (iv) that the alleged roadway to Cadeby was in fact the main return airway from Denaby ; (v) that its existence was unknown to the respondent, and no steps had been taken to bring it to his notice ; (vi) that, assuming that the main return airway was in accordance with the requirements of the Coal Mines Act, it was the duty of the appellants to make known to the respondent the existence of such airway and the use to which it could be put, and they had failed to do so ; (vii) that this return airway was not a satisfactory secondary means of egress such as to comply with the requirements of the Coal Mines Act, 1911 ; and (viii) that the use of the return airway in case of emergency would be dangerous, and would probably result in the death or injury of the respondent.

Cyril Radcliffe, K.C., and J. P. Ashworth for the appellants.

Hon. Sir Stafford Cripps, K.C., and Granville Slack for the respondent.

LORD HEWART, L.C.J. : This is a case stated by justices arising out of a summons preferred by the present appellants against this respondent under the Employers and Workmen Act, 1875, s. 4, alleging that the respondent had wrongfully absented himself from, or neglected, the service of the appellants at their Denaby Main Colliery on July 7 and July 8, 1938, and claiming damages for breach of contract. Having heard the evidence and the arguments, the justices dismissed the summons, and ordered the appellants to pay the costs of the proceedings. The question for us is whether or not in so doing they came to a correct determination on a point of law.

The case has been laid before the court with the greatest possible clearness, and it is not necessary that I should travel again over the very careful findings of fact which are set out in full in the case. It seems to me that, at the conclusion of the matter, the real contest was capable of being stated very shortly. By para. 4 of the case, the justices expressed the following determination :

That the respondent did not wrongfully absent himself from or neglect the service of the appellants [and] did not refuse to descend the mine because of the refusal of the appellants to "play" the mine on July 6 or July 7, 1938, in order that the respondent could recover unemployment benefit, but because he believed there was only one way of egress from the mine at the time.

That particular expression of opinion, I think, is to be preferred to the argument advanced on behalf of the appellants in paras. 2, 3, and 4—namely, that the only reason for the respondent's failure to work on July 7 and July 8 was the refusal of the manager to permit the pit to "play" on either of those dates, and that the question of the non-existence of a secondary means of egress was not raised until after the respondent had refused to work on July 7, 1938, and that such question was merely an afterthought. I think that what the justices are doing in para. 4 is to resist the suggestion or the contention that what had been done was merely by way of afterthought, or, in other words, was not sincere. The question seems to me to be of comparatively minor importance, but, such as it is, the justices have dealt with it. They go on to state determinations which seem to me, when they are read with the findings of fact contained particularly in the first part of the case, to have the effect of putting the appellants out of court. The justices

find that on July 7 and July 8 there was no secondary means of exit from the Barnsley seam at the appellants' Denaby Main Colliery. They find that :

... the said alleged roadway was a return airway, that it was unsafe as a means of egress, and, in case of an explosion, would have been filled with poisonous gases, foul air and coal dust, and all men travelling thereon would have been suffocated. ... the respondent did not know of the existence of the airway. . . .

They go on to find that it was the duty of the appellants under sect. 36 of the Act of 1911 :

... definitely and clearly to have made known to the respondent the existence and situation and mode of access to such airway, and the fact that such airway was available for his use as a travelling road to Cadeby Mine bottom.

Having set out those determinations, the justices state that the question of law for the opinion of this court is whether or not, upon the facts placed before them, they could find that there was no secondary means of egress from the Denaby Main Colliery available to the respondent on those days. That, if I follow what the justices intend, is another way of saying : " Was there any evidence before us to justify what we have found under this head ? Was there evidence before us upon which we could act ? " In my opinion, there clearly was evidence, and that evidence has been brought to a head in the findings of fact. The justices have satisfied themselves that in fact on the material days there was no secondary means of egress available, as required by law, at the Denaby Main Colliery. It is quite clear that the justices have found facts which give rise on the surface to some disputable question, but I think that part of their findings must be read in close connection with the termination, and the result is that, so far as there was a topic left in suspense, the justices have decided that topic, and decided it in a sense adverse to the appellants.

The justices proceed, however, to another statement as part of their statement of the question of law. They say that the question is whether or not, secondly—if I may insert the word—the requirements of the Coal Mines Act, 1911, s. 36, had been complied with. I am not at all sure even now, after listening to the very careful argument, that those words are not substantially a re-statement of the question already clearly expressed, and, although I have listened with attention to the argument of Sir Stafford Cripps on the meaning of sect. 36 of the Act of 1911. I am inclined to think—though I express no concluded opinion upon the matter—that he is disposed to put too pregnant a meaning upon the expression " available to the persons employed in every such seam." I am not at all sure that the argument which has been thrown out with reference to those words is either well-founded or necessary. The justices state that

... the respondent did not know of the existence of the airway ... it was the duty of the appellants definitely and clearly to have made known to the respondent the existence and situation and mode of access to the airway. . . .

I think that there the justices are really doing nothing more than, if

I may use the expression, dotting the i's and crossing the t's of that which they have already determined. I am not prepared to say that, so far as sect. 36 is concerned, the words "available to the persons employed in every such seam" can bear the meaning sought to be put upon them on behalf of the respondent. I have no doubt at all that the justices were entitled, upon the materials before them, to come to the conclusion to which they came, and that this appeal ought to be dismissed.

MACNAGHTEN, J. : I am of the same opinion. I desire to add very little. With regard to the matter with which LORD HEWART, L.C.J., has dealt, in the latter part of his judgment, there seemed to be some misapprehension on the part of the justices. The submission made on behalf of the respondent before the justices was that, assuming the return airways provided a secondary means of egress in accordance with sect. 36 of the Act of 1911, it was the duty of the appellants to make known the existence of that airway, and the use to which it could be put by the respondent. Then, when they came to their finding, the justices found that it was the duty of the appellants under the Coal Mines Act, 1911, s. 36, to make that fact known to the respondent. That was not what the submission was. The submission, as I understand it, was that the appellants, having informed the respondent of the existence of the two shafts, in accordance with the regulations provided under sect. 88, and the plan which they had to put up so that the workmen could see it, by their notice informed the workmen that one of those means of egress was closed. In those circumstances, the respondent was justified in believing that there was only one way of egress, and, unless the appellants informed him of the existence of another way of egress, they could not complain of his absenting himself from the work because he entertained a belief—I assume that it was an erroneous belief—which they themselves by their act have brought about. The finding of the justices does not seem to deal with the submission made on behalf of the respondent, with the result that the question of law which they submit does not seem to accord with it at all. I agree that the appeal must be dismissed.

SINGLETON, J. : I agree. It was for the justices to find the facts. They have found them, and, on the facts as stated, it is impossible for this court to give the relief which the appellants seek. I would add two things only. The first is that we are not saying or presuming to say that the return airway could never be a means of egress. The other thing is this. The Coal Mines Act, 1911, s. 36, provides, *inter alia*, as follows :

... that such shafts or outlets shall afford separate means of ingress and egress available to the persons employed in every such seam. . .

Counsel for the respondent argued that those words "available to the persons employed in every such seam" mean, and must be read as meaning, that they were known to the persons employed in every such seam. I think

that that is putting his case too high. One may have a means of egress which is available to the person employed even though that person has not taken the trouble to find out where it is. No doubt the regulations under the Act provide for the placing of plans in a prominent position so that they can be seen by the workmen, but, if there are two means of ingress and egress shown upon those plans, and if the workmen do not take the trouble to find out what they both are, it would be idle to say that proper means of ingress or egress were not provided. I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Field, Roscoe & Co.*, agents for *Davies, Sanders & Co.*, Chesterfield (for the appellants); *Jackson & Jackson*, agents for *J. W. Fenoughty, Dunn & Co.*, Rotherham (for the respondent).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

Re A DEBTOR (No. 11 OF 1939), DEBTOR *v.* CREDITOR AND OFFICIAL RECEIVER.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and du Parcq, L.JJ.),
March 31, April 3, 1939.]

Judgments—Foreign judgment—Appeal pending in French court—Application to set aside bankruptcy notice—Foreign Judgments (Reciprocal Enforcement) Act, 1933 (c. 13), ss. 2 (1) (b), 4 (1) (a) (iii), 5 (1).

A receiving order was made against a debtor on the ground of non-compliance with a bankruptcy notice. The bankruptcy notice was based upon a foreign judgment registered under the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The registration was effected on July 14, 1938, and on Feb. 14, 1939, the debtor entered an *opposition* in the Court of Appeal in Paris. It was contended that the bankruptcy notice was bad, because, until the *opposition* had been heard, the judgment could not be enforced by execution in France. It was also contended that the notice was bad because the debtor had not been served with notice of previous proceedings in the Court of Appeal in Paris, and that in any event, the court should set aside or adjourn the matter under the provisions of sect. 5 (1) of the Act. The debtor had received notice of the registration of the judgment in this country on July 14, 1938, and it was open to him then to apply to set aside that registration. He failed to do so, but, at the time of this appeal, there was a summons pending in the King's Bench Division for an extension of the time in which to apply to have that registration set aside:—

HELD: (i) as the judgment could have been enforced by execution in France at the date of its registration, the registration was valid, although, at a later date, it could not have been so enforced in France.

(ii) the debtor, having had notice of the registration of the judgment in this country, could not complain that he had had no notice of the subsequent proceedings, and, in the circumstances of this case, although there was a summons pending in the King's Bench Division, the order to be made upon which was wholly in the discretion of that court, the Court of Appeal were entitled to take the view that that discretion could not rightly be exercised in favour of the debtor, and the appeal ought to be dismissed, and not adjourned until the decision of the King's Bench Division was known.

[EDITORIAL NOTE. The first point in this case is purely one of construction of the Act, but the second point is of more general importance. Generally speaking, an appeal will be adjourned where there is an application pending, before another division of the High Court the result of which may influence the matter under appeal. The Court of Appeal, however, in the present case have decided that the pending application was so barren of merit, and, indeed, not really a *bona fide* application, that they could take the exceptional course of disregarding that application even although the order to be made upon it was wholly in the discretion of the court.

AS TO REGISTRATION OF FOREIGN JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 273-275, para. 576; and FOR CASES, see DIGEST, Vol. 11, pp. 469-472, Nos. 1241-1262.]

B Case referred to :

(1) *Evans v. Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.

C APPEAL from a receiving order made by Mr. Registrar KEAN, dated Feb. 20, 1939. An earlier appeal by the creditor from a decision of Mr. Deputy Registrar MELLOR, setting aside a bankruptcy notice, is reported [1939] 1 All E.R. 1, *sub nom. Re A Judgment Debtor (No. 2176 of 1938)*, *Judgment Creditor v. Judgment Debtor*. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

D *Richard O'Sullivan, K.C.*, and *Douglas Lowe*, for the appellant : Under French law, if judgment is given by default and no notice has been given to the debtor, the debtor is allowed to enter a notice of *opposition* to the judgment. The effect of the *opposition* is to vacate the judgment for the time being, and a re-hearing of the matter will follow. The *opposition* was entered on Feb. 14, 1939. The registration of the judgment was invalid, because judgment was given in default. I wish to attack the registration under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (1) (a) (iii), and I am relying upon sect. 5. It is a question for the court whether or not the registration of the judgment in July, 1938, can be set aside. There is nothing to preclude the registration from being set aside if the court thinks, in the exercise of its discretion, that it should be. The matters which should guide the court in the setting aside of a judgment were stated by LORD ATKIN in *Evans v. Bartlam* (1).

G *Cyril Salmon* for the respondents, was not called upon.

H SIR WILFRID GREENE, M.R. : The registrar was not satisfied as to the *bona fides* of the grounds of opposition to the petition. Speaking for myself, I go farther than he does, because I am quite satisfied as to their *mala fides*. The appeal is an appeal against a receiving order made on Feb. 20, 1939, in a matter which has already been before this court. The act of bankruptcy upon which the petition was based was non-compliance with a bankruptcy notice, the notice being based upon a foreign judgment registered under the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The debtor attacked that bankruptcy notice

upon one ground originally—namely, that a judgment registered under the Act could not be made the subject of a bankruptcy notice. That question came before this court, and this court on Dec. 20, 1938, decided against the contention of the debtor, and held that a registered judgment under the Act could be a good foundation for a bankruptcy notice.

The debtor's attack on the bankruptcy notice at that stage having A failed, the matter proceeded, and the petition came before the registrar. The debtor then produced further objections to the bankruptcy notice. Those objections have been brought before this court, and, on investigation, they fall under three heads, and these are the only grounds of opposition to the petition. The three grounds upon which it is said that B the bankruptcy notice was bad, or, at any rate, that it should not for the moment be treated as a good notice, are these. First of all, it was said that the registration of the foreign judgment (about which I shall have something to say presently) which was effected on July 14, 1938, was invalid under sect. 2 (1) (b) of the Act, which provides as follows: C

... a judgment shall not be registered if at the date of the application ... (b) it could not be enforced by execution in the country of the original court.

It appears that on Feb. 14, 1939, the debtor entered in the Court of Appeal in Paris, which was the court whose judgment was registered under the Act, what is called an *opposition*. I will explain that term a D little more fully presently, but evidence has been filed on behalf of the appellant to the effect, if it be accepted, that the result of entering that *opposition* was to deprive the successful litigant in the Court of Appeal in Paris of his right of execution in France. However, that fact, if it be E a fact, does not help the debtor in the present case, because the proviso to sect. 2, with which I am dealing, only comes into operation to prohibit registration if, at the date of the application, the judgment could not be F enforced by execution in the country of the original court. At the date of the application for registration, this *opposition* had not been entered, and at that date the judgment of the French court was indisputably enforceable in France by execution. The fact, if it be a fact, that, at a date subsequent to registration, it has lost that characteristic does not bring the matter within the language of that proviso. That point, therefore, entirely fails.

The next point which was taken arises under sect. 4 (1) (a) (iii) of the Act of 1933, which provides as follows: G

(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment (a) shall be set aside if the registering court is satisfied ... (iii) that the judgment debtor being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable H him to defend the proceedings and did not appear.

In order to appreciate that point and the answers to it, it is necessary to state a few more facts. The judgment of the Correctional Court in France, before which the defendant appeared on a criminal charge, was

delivered on June 9, 1936. That court awarded to the *parties civiles*, who are the present petitioning creditors, the sum of fr. 1,329,975 by way of damages. From that judgment the debtor did not appeal, but the petitioning creditors appealed. They appealed on two matters of substance. One was the dismissal by the Correctional Court of another claim which they were making against the debtor, the nature of which is immaterial, and the second was that they desired to get the judgment of the Correctional Court modified in the matter of the award of damages, not by altering the award, but by ordering payment of the sum specified by way of refund, and not by way of damages. The object of that was a matter with which the debtor was not concerned. It was merely that, on sums awarded by way of refund, a smaller tax is payable to the state than on sums payable by way of damages. The important point to remember is that the debtor did not appeal from that judgment, and the time for appealing against it has long since expired. The judgment on that appeal by the petitioning creditors was delivered by the Court of Appeal in Paris on June 26, 1937. The other claim by the petitioning creditors was dismissed, but the court condemned the defendant with two others, jointly and severally, to pay to the petitioning creditors the sum awarded by the Correctional Court. They condemned him to pay it by way of refund, however, and not by way of damages, "as was erroneously stated by the judges in the court below." That judgment of the Court of Appeal in Paris, which is, on the face of it, against the debtor for payment of money by way of refund, is the foreign judgment which was registered under the Act of 1933. It was registered on July 14, 1938. At this late stage, the debtor is now saying that he has a right to have that registration set aside upon the ground that he did not receive notice of the proceedings in the Court of Appeal in Paris. It is not suggested that he did not receive notice of the proceedings in the Correctional Court, but he says that he did not receive notice of the proceedings in the Court of Appeal in sufficient time to enable him to defend the proceedings, and he did not appear. Let me assume in his favour that he did not receive notice. The notice of appeal was served apparently in accordance with French law. However, that is immaterial if the debtor did not actually receive notice, and I will assume that he did not. The judgment, as I have said, was registered in this country on July 14, 1938, and shortly afterwards he was given notice of that registration, and he had, under the rules, 21 days in which to apply to set aside that registration. If he had duly made such an application, it would, of course, have been different. The fact to observe, however, is that he knew all along, if it be the fact that he had not received notice of the proceedings in the Court of Appeal, and, therefore, it was open to him as long ago as Aug., 1938, to apply under sect. 4 (1) (a) (iii) to have the registration set aside. He did nothing of the kind. Although the facts which would have formed the basis of such an application were well known to him from the very beginning, it is only when the bank-

ruptcy petition comes on for hearing that he endeavours to take that point. He has pending in the King's Bench Division, by a summons taken out on Mar. 27, an appeal against the original order for registration—that is to say, an appeal from the master to the judge. By that summons, he is asking for an extension of time in order that an appeal may be made, and, alternatively, he is asking for an extension of time in which to apply to have the registration set aside. So far as the section of the Act with which I am dealing at the moment is concerned, an application for an extension of time to enable him to raise at this late stage a case based on facts within his own knowledge, which he could have raised months ago, is, I should have thought, as hopeless an application as it is possible to conceive. I have no hesitation in saying that, notwithstanding the fact that that summons is pending in the King's Bench Division, this court is entitled, and is bound, when matters come before it upon which it is necessary to pronounce a decision for the purpose of disposing of an appeal in this court, to express its opinion on all relevant matters, and, when this court is asked to deal with this appeal upon the footing that there is some application in the King's Bench Division of a *bona fide* nature, with a reasonable chance of success, this court is bound to express its opinion upon that suggestion.

I have expressed my opinion, and I have expressed it, I hope, in perfectly clear and emphatic terms. My language is, I think, all the more justified when it is remembered that on Sept. 1, 1938—that is to say, during the currency of the 21 days which the debtor had for the purpose of applying to set aside the registration of the judgment—he obtained, on a summons taken out by himself, a month's extension of that time. The object of that application was to enable him to make some inquiries in France as to French law. That was the ostensible motive. French law had nothing whatever to do with this matter with which I am dealing under sect. 4 (1) (a) (iii). The substantial matter there, as I have said, was whether or not he had had notice. However, having obtained that month's extension, he allowed it to expire without apparently doing anything. He made no application for a further extension, as one would have expected if he was *bona fide* pursuing some investigations into French law which he had not had time to complete. The month expired, and now, when his attack on the bankruptcy notice, which was dealt with on the previous occasion by this court, has failed, and when he is, so to speak, in the last ditch, with the petition about to be made effective against him, he brings out this ground of opposition to it. To go back to what I said at the beginning, I am perfectly satisfied that that was done in bad faith. So much for the point raised under sect. 4 (1) (a) (iii).

The last point with which I must deal is a point raised under sect. 5, which provides as follows:

(1) If, on an application to set aside registration of a judgment, the applicant satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment, the court, if it thinks fit, may, on such terms as it may think just, either set aside the registration or adjourn the application

to set aside the registration until after the expiration of such period as appears to the court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal.

The debtor now says : “ I have an appeal pending in the Court of Appeal in Paris. True it is that it is not called an appeal, but it is in substance
 A an appeal. It is what is called an *opposition*, which is the procedure open under French law to persons against whom judgment has gone by default.” He says that he has such an appeal pending, and that he is proposing to ask a judge of the King’s Bench Division on his summons to grant him an indulgence which the court under that section has discre-
 B tion to grant upon that further ground. He asks us to say, either that his case is such, or that his chances of success are such, on that applica- tion, that we ought to dismiss the bankruptcy petition, or that we ought to adjourn this appeal in order to see what the judge in the King’s Bench Division will do upon that point. It is important to have one or
 C two further facts present to the mind in dealing with this point. As I have said, the debtor never appealed from the judgment of the Correctional Court. The judgment of the Court of Appeal substituted for the order of the Correctional Court a judgment differing, not in amount, but merely in the character of the payment. I am satisfied by
 D the evidence of Maitre Pacarda that any *opposition* by the debtor in the French courts could, at the most, have the effect, assuming it was successful, of replacing the original order of the Correctional Court, or rather of describing the amount as damages, and not as refund, and that this would have no effect on the pecuniary liability of the debtor. It is
 E a little difficult to see how the Court of Appeal in Paris at the instance of this debtor, on a matter which does not concern him—namely, the description of this sum as by way of refund, instead of as by way of damages—would grant him any relief at all. The important thing, to my mind, is that I am satisfied that in substance on that judgment he has
 F no *locus standi* to appeal against it. However, quite apart from that, there is no suggestion in the evidence which has been filed that he has one particle of merit in any steps which he may be advised to take in Paris with regard to this judgment against him. There is no suggestion that he suffered any injustice, or that some defence which he had was
 G not sufficiently attended to, or anything of the kind. He comes to this court with a judgment against him of the competent court in Paris on the ground of serious fraud. He makes no attempt in his evidence before us to bring forward any merits whatever for these proceedings by way of *opposition* in Paris. In those circumstances, and having regard
 H to the delay which has taken place, and the manner in which this claim is put forward, I ask myself whether or not it is within the bounds of possibility that an application under sect. 5 (1), based on the pendency of this opposition, and treating it as an appeal, would be one with which any court ought to comply. As we have to decide that point for ourselves here and now, I find myself completely satisfied that, for the purpose

of this appeal, we are entitled—and, in my view, we are, on the facts, bound—to treat the debtor as a person having no shadow of claim to the indulgence under the discretion conferred upon the court by sect. 5 (1). That, I think, disposes of all the three points which have been raised. In the result, the appeal is dismissed with costs.

CLAUSON, L.J. : I agree.

DU PARCQ, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Weldon & Edwards* (for the appellant) ; *Blount, Petre & Co.* (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

Dictum of LUXMOORE, L.J., at p. 407, disapproved. BASMA v. WEEKES.
[1950] 2 All E.R. 146.

SMITH-BIRD v. BLOWER.

Not followed. BASMA v.
WEEKES
[1950] A.C. 441

[CHANCERY DIVISION (LUXMOORE, L.J., sitting as an additional judge),
March 6, April 5, 1939.]

Contract—Necessity for writing—Memorandum—Letter by defendant to his solicitor—Privilege—Sufficiency as memorandum—Law of Property Act, 1925 (c. 20), s. 40.

The defendant offered two houses for sale by auction early in 1938, but the reserve was not reached. Later the plaintiffs, husband and wife, authorised the female plaintiff's father, Mr. Harry Brown, to buy the houses for them, and with this object in view he called on the auctioneer. By way of introduction of Mr. Brown to the defendant, the auctioneer wrote the defendant's name and address on the back of a slip of paper on which his own name and address were printed, and informed Mr. Brown that, in the event of a sale, the deposit should be paid to Mr. Brown's solicitors. Mr. Brown then called on the defendant, who eventually agreed to sell him the houses for £510, and in proof of this the defendant wrote on the back of the above-mentioned slip of paper : " Let bearer, Mr. Brown, have property 74 and 76, Midland Road, Ellistown, for £510. D. Blower." Nothing was said about the deposit. Mr. Brown went to his solicitors, produced the document, and paid a deposit of £60, receiving a receipt. On February 23, 1938, the defendant, in reply to a letter from his solicitors, wrote to them confirming the note of authority given by him to Mr. Brown " to convey the above property to him for £510." Subsequently the defendant instructed his solicitors to return the deposit of £60 to Mr. Brown, as he was not prepared to proceed with the sale. The plaintiffs instituted proceedings for specific performance of the agreement for sale. The letter written by the defendant to his solicitors was not disclosed, being thought to be a privileged document, but, being mentioned at the trial by the defendant, was then produced :—

HELD : (i) the defendant had verbally agreed with Mr. Brown for the sale to him of the two houses for £510, and thought he was dealing with Mr. Brown as a principal, although in fact the latter was acting as agent for the plaintiffs.

(ii) the letter written by the defendant to his solicitors was not privileged from disclosure, as it was not written for the purpose of obtaining legal advice.

(iii) the slip of paper which Mr. Brown had received from the defendant did not itself constitute a memorandum of any agreement for sale of the

two houses in question, but the letter of Feb. 23, 1938, from the defendant to his solicitors, referring to the agreement for sale of the property to Mr. Brown, was a sufficient memorandum of the contract relied on by the plaintiffs to satisfy the requirements of the statute, and they were, therefore, entitled to succeed in the action.

[EDITORIAL NOTE. It was doubted in *Goodwin v. Fielding* (1853), 4 De G.M. & G.

A 90; 12 Digest 131, 873, whether a letter to the party's own solicitor was a sufficient memorandum within the statute. The matter was not very fully considered there, but the doubt is now resolved, and it is decided that such a letter may be a good memorandum provided it satisfies the other conditions which such memoranda have to satisfy.

B AS TO MEMORANDUM WITH STATUTE OF FRAUDS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 112-115, paras. 160-162; and FOR CASES, see DIGEST, Vol. 12, pp. 130-136, Nos. 867-915.]

Cases referred to :

- (1) *Filby v. Hounsell*, [1896] 2 Ch. 737; 12 Digest 144, 983; 65 L.J.Ch. 852; 75 L.T. 270.
- C (2) *Lovesy v. Palmer*, [1916] 2 Ch. 233; 12 Digest 144, 984; 85 L.J.Ch. 481; 114 L.T. 1033.
- (3) *O'Rourke v. Darbishire*, [1920] A.C. 581; 18 Digest 84, 377; 89 L.J.Ch. 162; 123 L.T. 68; *affg.* S.C. *sub nom.* *Re Whitworth*, *O'Rourke v. Darbishire*, [1919] 1 Ch. 320.

D ACTION by the plaintiffs for specific performance of an agreement for the sale to them of two houses. The facts are fully set out in the judgment.

R. T. Paget for the plaintiffs.

C. M. Cahn for the defendant.

E LUXMOORE, L.J. : The plaintiffs, who are husband and wife, claim in this action specific performance of an agreement for the sale to them by the defendant of two houses, Nos. 74 and 76, Midland Road, Ellistown, in the county of Leicester. The defendant denies that he entered into any agreement for the sale of these houses to the plaintiffs, and says that, if, contrary to his contention, he did so, there is no sufficient memorandum in writing of such agreement to satisfy the provisions of the Law of Property Act, 1925, s. 40.

F

G It is common ground that the discussions which the plaintiffs say culminated in an agreement took place between the defendant and a Mr. Harry Brown, who is the father of the female plaintiff. The plaintiffs' case is that Mr. Brown was throughout the discussion acting as their agent, and that they are, therefore, entitled to enforce any contract into which he entered on their behalf. The first question to be determined, therefore, is whether any verbal agreement for sale and purchase was concluded between Mr. Brown and the defendant. If the answer is in the affirmative, the further question arises whether there is a sufficient memorandum of that contract to comply with the requirements of the statute. In this connection, it is necessary to determine whether the defendant was aware that Mr. Brown was acting as agent only, and not

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as principal, for, if the defendant knew that Mr. Brown was only an agent, the memorandum, in order to comply with the statutory requirements, must either contain the names of the plaintiffs as principals or otherwise identify them, whereas, if the defendant was not aware of the fact that Mr. Brown was acting as agent for anyone, but considered that Mr. Brown was contracting on his own behalf, the position is different, A and the plaintiffs as undisclosed principals can rely on any sufficient memorandum in which Mr. Brown's name appears as principal, although there is no reference therein to the plaintiffs: *Filby v. Hounsell* (1) and *Lovesy v. Palmer* (2).

The facts appear to be as follow. Early in 1938, the defendant offered B the 2 houses in question for sale by auction, the auctioneer being a Mr. Hewes, who carried on his business at Marlborough Square, Coalville, Leicester. The reserve was not reached at the auction. On Feb. 22, 1938, Mr. Harry Brown, who had been authorised by the plaintiffs to buy the houses for them, called on Mr. Hewes and asked him about the C houses. By way of introduction of Mr. Brown to the defendant, Mr. Hewes wrote the defendant's name and address on the back of a slip of paper on which the name and address of Mr. Hewes were printed and gave this paper to Mr. Brown. Mr. Brown asked Mr. Hewes to whom he was to pay the deposit if he bought the houses, and was told, after D Mr. Hewes had spoken over the telephone, that any deposit must be paid to Mr. Brown's solicitors, Messrs. Crane & Walton, No. 19, London Road, Coalville. Armed with the slip of paper, Mr. Brown called on Mr. Blower and showed it to him. He asked the price of the houses. Mr. Blower said that it was £550. Mr. Brown says that he told Mr. Blower that the E house was for his daughter, and bid him £510 for it. Mr. Blower asked him to make it £525, and said that, if he did this, he should have the houses. Mr. Brown refused to make any advance on the £510 already offered, and Mr. Blower left the room for a short time. When he returned, he told Mr. Brown that he could have the houses for £510. Mr. Brown F says that he then asked Mr. Blower to give him a note to prove that he had bought the property, and thereupon Mr. Blower wrote on the face of the slip of paper already mentioned the words which now appear on it :

Let bearer, Mr. Brown, have property 74 and 76, Midland Road, Ellistown, for G £510. D. Blower.

Both the defendant and Mr. Brown agree that nothing was said about any deposit being paid. They also agree that the matter was to be carried through as quickly as possible. After this interview, Mr. Brown went to Coalville and called on Messrs. Crane & Walton. He saw Mr. H Hunt, one of the partners in the firm, and produced the slip of paper to him, saying that he had come to pay a deposit. After Mr. Hunt had read the note, Mr. Brown handed Mr. Hunt his cheque book and asked him to write out a cheque for the deposit for him to sign. Mr. Hunt complied with this request making out a cheque for £60 which Mr. Brown signed and gave to him. Mr. Hunt then handed Mr. Brown the receipt. H

This receipt refers to the £60 as "deposit on Nos. 74 and 76, Midland Road, Ellistown," and contains these words: "subject to formal contract being signed."

A Mr. Blower stated in his evidence in chief that he gave the slip of paper to Mr. Brown to hand to his (Mr. Blower's) solicitors to prepare a contract between himself and Mr. Brown, but, in answer to a question by me, he said that he did not tell Mr. Brown this, but that this was his intention. Mr. Blower said that he received a letter from his solicitors on Feb. 23 with regard to the matter, and that on the same day he replied to it by a letter which, omitting formal parts, is in these words:

B

Re 74 and 76, Midland Road, Ellistown.

In reply to yours of the 22nd instant, I beg to confirm that I gave Mr. Harry Brown a note of authority to convey the above property to him for £510. I further note that you will let me know when you wish me to come over to complete.

C This letter was signed by the defendant. Subsequently the defendant instructed his solicitors to return the deposit of £60 to Mr. Brown, and by letter of Mar. 4, 1938, Messrs. Crane & Walton informed the plaintiffs' solicitors, Messrs. Hale & Mander, that the defendant was "not prepared to proceed with the proposed sale," enclosing a cheque for £60 payable to the solicitors, and asking for the return of the receipt. After some D further correspondence, the writ in this action was issued on May 4, 1938. Mr. Brown stated in evidence that he told the defendant that the property was for his daughter, and the defendant said that he understood from this that Mr. Brown was buying the property for his daughter, and that, when Mr. Brown told him this, the defendant expressed the view that E this was a very kind action.

The conclusion at which I have arrived, after a careful consideration of the evidence, is that the defendant verbally agreed with Mr. Brown for the sale to him of the two houses for £510. I am further satisfied that the defendant thought that he was dealing with Mr. Brown as a F principal, and that he had no idea that Mr. Brown was acting as an agent for the plaintiffs, or for any other person or persons. I am also satisfied that Mr. Brown was in fact acting as agent for the plaintiffs. Consequently, provided that there is such sufficient memorandum of the agreement between Mr. Brown and the defendant as would entitle Mr. G Brown personally to enforce the agreement against the defendant, the plaintiffs as undisclosed principals are themselves entitled so to do.

H The memorandum relied upon by the plaintiffs was the slip of paper, the terms of which I have already stated. I am unable to hold that this document constitutes a memorandum of any agreement for sale of the properties in question, for, although it mentions the name of Mr. Brown, identifies the two houses in question, and refers to the sum of £510, it does not in terms refer to any agreement for sale. The document is not addressed to anyone, and is in form a request to some unnamed person to let the bearer, Mr. Brown, have the property in question for £510. What the precise relationship between Mr. Brown and Mr. Blower is

with regard to the property does not appear on the face of the document. Apart from any explanatory evidence, it would appear to constitute a polite request to some unnamed person to let Mr. Brown have the property for a named sum of money. The document does not disclose to whom the money is to be paid, or precisely for what it is to be paid. It might as well be that the money was to be paid by way of premium for a lease as that it was to be paid for a purchase of the freehold. If this had been the only available document, I should have felt bound to hold that there was no sufficient memorandum of the contract for sale relied upon by the plaintiffs, and to have dismissed the action. Fortunately for the plaintiffs, however, there is another document signed by the defendant—namely, the letter of Feb. 23, 1938, to his solicitors, to which I have already referred. This letter plainly refers to the agreement for sale of the property to Mr. Brown for £510, and is, in my judgment, a sufficient memorandum of the agreement relied upon by the plaintiffs to satisfy the requirements of the statute. This letter was not disclosed to the plaintiff's legal advisers, because privilege for it was claimed in the defendant's affidavit of documents. It was referred to by the defendant in his evidence. After it had been produced to me, I took the view that the claim for privilege could not be sustained with regard to it, because the letter was written by the defendant, not for the purpose of obtaining legal advice from his solicitors, but in answer to an inquiry by them to inform them of the fact that he had agreed to sell the property in question to Mr. Brown: *O'Rourke v. Darbishire* (3), per VISCOUNT FINLAY, at p. 602. As this letter had not been disclosed to the plaintiffs or their advisers, owing to their wrongful claim for privilege, I gave the plaintiffs leave to amend their statement of claim by pleading it specifically. I hold that the defendant's letter of Feb. 23, 1938, to his solicitors is a sufficient memorandum of the contract relied upon by the plaintiffs, and that the plaintiffs are, therefore, entitled to succeed in this action.

I accordingly make a decree for specific performance of the contract in the usual form, which will include a reference to title, since the title has not been considered or accepted.

Solicitors: *Gibson & Weldon*, agents for *Leslie Hale & Mander*, Coalville (for the plaintiff); *Woolley & Whitfield*, agents for *Crane & Walton*, Leicester (for the defendant).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

Re AN ARBITRATION BETWEEN STIMPSON AND OTHERS
AND GOSPORT AND FAREHAM OMNIBUS CO. AND
PORTSMOUTH CORPORATION.

[KING'S BENCH DIVISION (Atkinson, J.), **March 31, April 3, 1939.**]

- A** *Electricity Supply—Transfer of undertaking—Compensation for loss of employment—Employee of authorised undertaking other than a transferred undertaking—Electricity (Supply) Act, 1919 (c. 100), s. 16—Electricity (Supply) Act, 1922 (c. 46), s. 21—Electricity (Supply) Act, 1933 (c. 46), s. 1.*

In 1903, by a private Act, the Gosport and Fareham Tramways Co. were authorised to run electric tramways over an area which included Gosport. They were also authorised to enter into agreements with any local authority or electric power company in the districts in which the tramways were situate to supply any such local authority or electric power company with current for any authorised purposes. There was no provision limiting such agreements to such time as the tramways should be operated in the area in question. The company constructed mains for the supply of current for lighting purposes to an undertaking which was subsequently taken over by the Portsmouth Corporation. In 1929, a private Act was passed for the discontinuance of the tramways in Gosport and for the substitution of omnibuses therefore, but it authorised the tramways company to continue to supply current to those to whom they were already supplying it—that is, in the circumstances of this case, to the Gosport Corporation. From 1937, the Gosport Corporation took their supply of electric current from the Portsmouth Corporation, and in that year, there being then no one to whom the tramways company could supply electric current, the generating station of the tramways company was closed down and the employees were dismissed. The latter thereupon claimed compensation under the Electricity (Supply) Act, 1919, s. 16 (as amended in 1922 and 1933):—

HELD: the employees were entitled to compensation, although the undertaking in which they were employed was not transferred. It was sufficient to show that they were employed by an authorised undertaking and that they lost their employment by the transfer of an authorised undertaking—the latter not being the authorised undertaking which employed them, which in this case was not transferred but closed down.

- F** **[EDITORIAL NOTE.** This question turns upon the construction of the Electricity (Supply) Act, 1919, s. 16, and the sole point considered is whether the officer who is to receive compensation must have been in the employ of a transferred undertaking or whether it is sufficient for him merely to have been in the employ of an authorised undertaking which, by reason of the operation of the scheme for the improvement of the supply, has closed down, or for some other reason has been compelled to dismiss him from its service. The decision is in favour of the wider construction of the section.

- G** AS TO COMPENSATION OF OFFICERS OF ELECTRICITY AUTHORITIES FOR LOSS OF EMPLOYMENT, see HALSBURY, Hailsham Edition, Vol. 12, pp. 628-630, para. 1217; and FOR CASE, see DIGEST, Vol. 20, p. 216, No. 103. For the Electricity (Supply) Act, 1919, s. 16, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 7, pp. 764, 765, and Vol. 26, p. 137.]

H CASE STATED by an arbitrator for the opinion of the court upon the question whether certain employees of the Gosport and Fareham Omnibus Co. were entitled to compensation for loss of employment. The facts are fully set out in the judgment.

G. D. Squibb for the employees.

Hon. Sir Stafford Cripps, K.C., and G. G. Slack for the Gosport and Fareham Omnibus Co. and the Portsmouth Corporation.

ATKINSON, J. : The question in this case is whether or not certain employees of the company which we have called the omnibus company, have the right to compensation from the Portsmouth Corporation because of the loss of their employment with the omnibus company as a result of certain transfers of the undertaking of the electric lighting company. By the Gosport and Fareham Tramways Act, 1903, the omnibus company, then called the Gosport and Fareham Tramways Co., were authorised to run tramways, and the district which they were authorised to supply included Gosport. Under certain sections, additional powers were given to them. First, by sect. 19, they were empowered to erect a generating station and to generate electricity and transmit it for the purpose of working their tramways. Then, by sect. 61, they were given power to enter into agreements with

... any local authority in whose district or any company in whose limits for the supply of electricity any portion of the tramways are or will be situate ... for ... the supply of any such local authority or company of electrical power for any purpose for which such authority or company are for the time being authorised to supply the same.

The effect of that was that, if the Gosport local authority, for example, were to undertake the supply of electricity to consumers in the district, or if some private company got statutory powers to supply electricity to consumers in the Gosport district, the omnibus company were entitled to enter into agreements with such authority or such company to supply them with the necessary electricity. It is to be observed that the area within which the omnibus company are entitled so to act is an area in which any portion of the tramways was at that date, or would in future, be situate. There is no word there which limits this power of supply to the time during which tramways would be there. Once a district is brought within their area because of the presence of the tramways, power is given to supply any authority or company serving that district. I think that that must have been the meaning, because an agreement might be entered into for a long term of years with an authority or a company, and at any time the tramways might, perhaps, cease to be in that area, or the power to run tramways there might be taken away, or Gosport might cease to operate them. I have in mind a case where a local authority permitted tramways to come and the tramways turned out to be such a nuisance that the local authority would not renew the agreement, and the tramways had to be removed. There may be many reasons why the existence of tramways in a particular area may be terminated, but there is not a word there saying that an agreement into which they enter must be limited to the period of time during which tramways are there, or must necessarily come to an end if at any moment the tramways cease to be there. At any rate, that would seem to me to be the *prima facie* meaning of sect. 61. The tramways were laid, a generating station was con-

structed, and, as the case finds, the omnibus company did supply electricity to the electric light company which had authority to supply electricity for lighting purposes in that area.

A It is not challenged that by that Act the omnibus company became an authorised undertaking, because they were authorised to supply to a company, which is a statutory authority for the supply to consumers of electricity in that area. Para. 15 of the case finds that the omnibus company did construct mains between their generating station at Hoeford and a certain substation of the lighting company for the purpose of supplying electricity to the electric light company, and that these mains
B were at all times the property of the omnibus company. The next thing that happened was that in 1929 it was desired to discontinue the tramways and to substitute omnibuses, and an Act was passed called the Gosport and Fareham Omnibus Services Act, 1929, which put an end to the power to run tramways in Gosport. There was a recital which is of
C some value, and which reads as follows :

And whereas under powers conferred on the company by the Gosport and Fareham Tramways Act, 1903, and the Gosport and Fareham Tramways Act, 1905, the company have constructed further tramways in the borough of Gosport, the urban district of Fareham, and the parish of Rowner, in the rural district of Fareham, and have erected a generating station where electricity is generated for working the tramways and for supply to authorities and companies authorised to distribute
D electricity . . .

Then sect. 6 enacted that the company should at a certain date "abandon and discontinue the working of the tramways," and by Dec. 31, 1929, the tramways were in fact abandoned, and the omnibus service started on Jan. 1, 1930. Sect. 6 (2) is of importance, and reads as follows :
E

As from the date of abandonment all powers obligations and liabilities of the company in relation to the tramways and the rails and paving setts . . . shall cease and determine.

I read that as meaning that all powers, obligations, and liabilities in relation to the actual lines, the constructional part of the tramways—not
F in relation to their whole undertaking, but to the actual fitting of lines, rails, paving setts, and the like—shall cease and determine, with no further rights in respect of the roads and tramways. Then sect. 39, which is very important, to my mind, begins as follows :

G (1) In addition and without prejudice to any other powers conferred on the company by the existing Acts or this Act to sell lease exchange dispose of retain hold use or otherwise deal with any lands belonging to them, the company may . . . retain hold and use for such time and for such purpose as they may think fit . . . any lands generating station transforming station buildings works or other property whatsoever or any interest in lands acquired or held by them under or for the purposes of the existing Acts or this Act, and may sell [if they so desire]. (2) If
H the company shall under the powers of this section sell the generating station . . .

That section seems to me to contemplate, and, indeed, enact, that any existing powers they have for supplying electricity shall be continued, and that the supply which they are at that time making to the electric lighting company shall be continued, and it seems to me that there by special Act plain authority is given to them to continue to supply the

company or local authority, or whatever it may be, to whom they are at that time giving a supply.

To my mind, it seems impossible to say that they are not within the definition in the Electricity Supply Act, 1919, s. 36, which provides as follows :

The expression "authorised undertakers" includes authorised distributors and power companies . . . "a power company" means any company or person . . . authorised by special Act to supply electricity to authorised distributors and lighting authorities, or to other persons for power purposes, whether with or without a subsidiary power to supply electricity for lighting purposes.

The electric lighting company was certainly an authorised distributor and lighting authority, and, when the Portsmouth Corporation took the place of the electricity company, the Portsmouth Corporation certainly became authorised distributors and lighting authorities. Therefore, as it seems to me, at all material times the omnibus company was a company authorised by a special Act to supply electricity to an authorised distributor and lighting authority, and what was in fact done was done under those powers. The case finds what was done—namely, that, after 1929, after the passing of that Act, the omnibus company continued to supply to this electric lighting company, and then on Jan. 30, 1934, the Gosport Corporation gave notice to purchase the undertaking of the electric lighting company. Apparently, the actual transfer was not made to the Gosport Corporation, but the omnibus company continued to supply, and on Apr. 3, 1936, after the making of a number of orders and the like, the electric lighting company's undertaking was transferred to the Portsmouth Corporation, when the omnibus company at once entered into an agreement with the Portsmouth Corporation to continue to supply for the time being. The Portsmouth Corporation apparently had not the necessary means, or their system was thought not to be suitable at the time, and up to Nov. 17, 1937, the company continued to supply under this agreement to the Portsmouth Corporation. During that year, the corporation were installing their mains so that they could give their own supply. The amount supplied by the omnibus company was actually diminishing, and eventually by Nov. 17, 1937, the corporation were ready to take over the complete supply. The omnibus company therefore ceased to supply, and, there being no other purpose for which they had been generating, they ceased to generate the electricity at their station. During that year, the persons whose claims I am considering—there are a number of them—gradually ceased to be employed, and the last of them ceased to be employed on Nov. 17, 1937.

What are the points which are raised in this case ? The first is stated in para. 31 of the case. The corporation contended that in law the claimants were not entitled to compensation under the provisions of sect. 16 of the Act of 1919, as amended by subsequent enactments, unless they had been regularly employed in or about the undertaking which was transferred. This leads to the necessity for interpreting the Electricity (Supply) Act, 1919, s. 16, which has been twice amended, once by an

Act of 1922 and once by an Act of 1933. The relevant words are that, when under that Act a transfer of the whole or any part of an undertaking has been effected, or an authorised undertaker has ceased to operate, or changed the method of operation of the whole or any part of an undertaking in pursuance of a scheme or an agreement or an arrangement, and any officer or servant who has been regularly employed in or about the undertaking or any authorised undertaking proves that he has suffered loss of employment, or been placed in a worse position—to put it shortly—he shall be entitled to compensation. I am not reading every word, but only what seems to me to be sufficient to raise the point which has been taken.

The point taken for the corporation is that one really has to regard this section as dealing with two separate and different things. The first thing with which it is dealing is a transfer of an undertaking, and the second is some change involved by an authorised undertaker entering into some scheme or agreement which reduces the extent of its operation. It is said that the words must be read as meaning that, where there is a transfer of the whole or any part of an undertaking, any servant who has been regularly employed in or about the undertaking transferred may have a claim to compensation. Then the other part of the section is that, where an authorised undertaker has ceased to operate, or has changed his method of operation, and so on, any servant of that authorised undertaking who suffers may have a claim to compensation. We have really got to split the section in two, recognising that, although overlapping and mixed up with other words, certain words refer to the one compartment and other words refer only to the other compartment. On the other hand, it is said: “No. Where there is a transfer of the whole or any part of an undertaking, and where there is somebody who is employed by that undertaking, or is employed in any authorised undertaking which may be affected by that change, that person is entitled to compensation.” Here, of course, the persons who were employed were not employed in the undertaking which was being transferred. They do not come within those words. There is a transfer of an undertaking being effected, but the servants claiming have not been regularly employed in or about the undertaking—that is to say, the undertaking transferred. They do not come within those words, but they say that they were employed by an authorised undertaking and that they have suffered loss of employment because of a transfer. I think that that interpretation is the true one. I do not think that the servants who alone can claim compensation are those employed by the undertaking transferred. It seems to me that, if, as a result of the transfer of an undertaking, someone employed by any authorised undertaking can show that he has lost his employment as a result of that transfer, he is entitled to claim compensation. Here it is perfectly clear as a matter of sheer fact that the employees of the omnibus company lost their employment because of the transfer of the electricity supply undertaking to the Portsmouth

Corporation. There can be no question about that. It seems to me that the section recognised precisely the sort of thing which did happen in this case—namely, that there might be some private undertaking getting its supply of power from an authorised undertaker, a private supply company transferring or being absorbed by a larger authority which was going to generate its own electricity, and this authorised undertaking which had been performing a very useful public service, perhaps for years, suddenly finding itself out of business and being compelled to close down. It would be grossly unfair that persons employed by such an undertaking should not be entitled to compensation in just the same way as are the servants of the undertaking transferred. There can be no real reason for including one and not the other.

Then it seems to me that there are one or two grammatical difficulties in the way of the contention put forward on behalf of the corporation, because, if it meant that, one would have expected to find, not the words “or any authorised undertaking,” but “any such authorised undertaking,” or “the authorised undertaking ceasing to operate or changing its methods.” One would expect to find in this line—“employed in or about the undertaking or any authorised undertaking”—some words limiting the meaning of “authorised undertaking” there by reference to the authorised undertaking which has ceased to operate or changed its method. One could not have wider words than “or any authorised undertaking,” and I can see no reason for limiting the plain meaning of those words. I think that, merely as a matter of construction, there is no doubt about it, but, if there were any doubt, I am not at all sure that one would not be entitled to look at sect. 16 as it was originally drawn. If the meaning of this was quite clear, one could not vary that meaning by looking at the original section. However, I do not see why, if the section is ambiguous, or can mean one of two things, one should not look at the section as originally drawn to see what it meant, because I should imagine that *prima facie* benefits already conferred would not be taken away, except by clear words. Looking at the section as originally drawn, although the point probably is open, it is conceded that it is far more difficult to contend for the meaning which the corporation say that I ought to put on this section. At any rate, that is the conclusion to which I have come—namely, that, where there is a transfer of an undertaking, any person who loses his work because of that transfer, whether he is employed by the undertaking transferred or by an authorised undertaking, has the right to claim compensation.

Then the next point which is raised is in paras. 33 and 34 of the case, and it is argued that, even if the meaning which the arbitrator puts upon sect. 16, and that which I put upon it, be right, still these people were not employed by an authorised undertaking at the time, or in the neighbourhood of the time, when they lost their employment. It was contended first that the omnibus company ceased to be an authorised undertaking on May 10, 1929, and that, if it did not cease then, it did

- so on Dec. 31, 1929—that is, the date when the tramways were in effect closed down—or, alternatively, on Apr. 4, 1936. I have really dealt with these points already. In my opinion, the omnibus company did continue to be an authorised undertaking right up, not merely to Apr. 4, 1936, but to the final day on which they continued to supply electricity
- A to the Portsmouth Corporation. It seems to me that during the whole of that time they were—I am looking now at the definition—authorised undertakers. During the whole of that time they were an authorised power company, and they were authorised by special Act to supply electricity to the people to whom they were supplying—that is, to these
- B two bodies, first of all the electricity supply company and then the Portsmouth Corporation. It is said that the arbitrator has found that they ceased to be authorised undertakers on Apr. 4, 1936, but I do not think so at all. He gives that finding with reference to the three points taken. However, if he did so find, then I should have thought that he
- C was wrong. I can see no reason whatever for drawing a distinction between Apr. 4 and Nov. 17. I do not think, however, that he meant to find that. I think that he merely negatived the three contentions put forward, and I think that at all material times the company was an authorised undertaking, and, as a matter of fact, that the employment of
- D every one of these men was terminated on or before Nov. 17. I think that they were all entitled to compensation, and therefore I answer these questions in the same way as that in which the arbitrator answered them.

- With regard to the question whether they were employed in or about
- E the undertaking at the date they suffered loss, it was with that point in mind that I dealt with the date of Nov. 17. I think that it was an authorised undertaking right up to that date. Even there, however, if, for some reason which I cannot see, and which counsel cannot suggest, they had ceased to be an authorised undertaking in April, it would not
- F seem to me to affect the question, because the words are not “any officer or servant who was at the date of the transfer employed in or about the undertaking or any authorised undertaking,” but “who had been regularly employed.” I do not think that it would affect the matter, but it seems to me that at every relevant date the company was an
- G authorised undertaking.

Solicitors : *Norton, Rose, Greenwell & Co.*, agents for *F. J. Sparks*, Portsmouth (for the appellants) ; *W. H. Thompson* (for the respondents).

[Reported by *W. J. ALDERMAN*, Esq., *Barrister-at-Law.*]

In the Estate of SAXTON, BARCLAYS BANK, LTD. *v.*
TREASURY SOLICITOR.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
February 17, 1939.]

Executors—Probate—What documents admitted to probate—Document with no A
dispositive contents executed as will—Lists of bequests on separate papers
found under same cover—Papers not referred to in will—Circumstantial
evidence.

The testator sat down to write his will at about 11 a.m. and continued B
writing until 1.15 p.m. His housekeeper, who was continually in and
out of the room, stated that he was writing all the time. About
1.15 p.m., the testator telephoned to the defendant bank, the executors
of the will, for two witnesses to come to his house. The witnesses were
sent and the will duly executed. After execution, the document was
placed in a drawer. About a month later, when the testator was seriously
ill, this drawer was taken up to his bedroom, and the testator took from
it two documents which he put into an envelope. After his death, the
actual will was found to be of no dispositive effect. It contained C
an appointment of executors and then proceeded as follows: "I give and
bequeath . . . to the following persons." There was found with the
will a number of lists beginning with the statement: "I wish to leave
the following amounts"—

HELD: in the circumstances of this case, it must be taken that the D
lists were intended to be part of the will, and the will and the lists were
admitted to probate.

[EDITORIAL NOTE. It is well known that, where gifts are made by documents
incorporated in the will, there must be in the will itself a reference to the docu-
ments. In the ordinary way there is a specific reference both in the will and on
the documents incorporated. Here the judge has found words in the will and
corresponding words on the documents which he holds to be a sufficient incor- E
poration.

AS TO DOCUMENTS ADMITTED TO PROBATE, see HALSBURY, Hailsham Edn.,
Vol. 14, pp. 194, 195, para. 318; and FOR CASES, see DIGEST, Vol. 44, pp. 256,
257, Nos. 822-839.]

Cases referred to:

- (1) *In the Goods of Wotton* (1874), L.R. 3 P. & D. 159; 44 Digest 256, 830; 43 F
L.J.P. & M. 14; 30 L.T. 75.
- (2) *In the Goods of Gilbert* (1898), 78 L.T. 762; 44 Digest 257, 836.
- (3) *In the Goods of Kimpton* (1864), 3 Sw. & Tr. 427; 44 Digest 257, 835; 33
L.J.P.M. & A. 153; 10 L.T. 137.
- (4) *In the Goods of Birt* (1871), L.R. 2 P. & D. 214; 44 Digest 257, 838; 24 L.T. G
142; *sub nom. In the Goods of Burt*, 40 L.J.P. & M. 26.
- (5) *Rees v. Rees* (1873), L.R. 3 P. & D. 84; 44 Digest 254, 808; 29 L.T. 375.
- (6) *Allen v. Maddock* (1858), 11 Moo. P.C.C. 427; 44 Digest 243, 698; 31 L.T.O.S.
359; *affg.* (1857), Dea. & Sw. 325.

PROBATE ACTION. The plaintiff bank claimed probate as executors H
named in the last will of the deceased contained in a paper writing
dated Apr. 6, 1937, and 4 other undated paper writings found therewith.
The parties cited, certain named charities, adopted the plaintiff's pleading.
The defendant, the Treasury Solicitor, who was interested on an intestacy,
admitted due execution of the will, but denied (i) that the 4 paper

writings found with the will were either duly executed or incorporated by reference in the will, and (ii) that the 4 paper writings or any of them formed part of the will.

J. Serrell Watts, for the plaintiff, submitted to any order which the court might make.

A *Ifor Lloyd*, for the parties cited, referred to *In the Goods of Wotton* (1), *In the Goods of Gilbert* (2), *In the Goods of Kimpton* (3), *In the Goods of Birt* (4) and *Rees v. Rees* (5).

H. W. Barnard, K.C., for the defendant, referred to *Allen v. Maddock* (6).

B

C HENN COLLINS, J. : This case raises questions of fact, and, to some extent, questions of law. Broadly speaking, I have to decide the question whether or not certain papers which contained the names of a number of people, with a sum of money opposite each name, and a statement of a number of charities to benefit in equal shares, were, by incorporation, part of a will dated Apr. 6, 1937. The first question which I have to answer in that state of things is whether or not the plaintiff, upon whom the burden falls, has satisfied me beyond all reasonable doubt that those papers (which, for convenience, I will call lists) were in existence at the time when the will was executed, because, unless the court is so satisfied, no further question arises, and they form no part of the will, and can form no part of the will.

D

E The circumstances, upon the evidence, are shortly these. The testator, George Arthur Saxton, was being looked after by a Miss Ffrench, and on Apr. 6, 1937, he was brought down to the dining-room for the avowed purpose of writing his will. For this purpose he had apparently provided himself with foolscap. He started writing at about 11 a.m., and continued to write until 1.15 p.m., luncheon time. Miss Ffrench passed in and out of the room on her duties, and meanwhile the testator was writing. Then, and not until then, he himself telephoned a message to the bank for two witnesses to the will. They arrived, and were shown into the dining-room, where the testator (I omit what is immaterial) was at the writing-desk. On the desk, there was a document which afterwards became the will which he executed in their presence, they occupying his chair successively and signing after him. The document was lying upon a blotting-pad at this time. Beyond the fact that, possibly because of the blotting pad, or possibly for other reasons, they were aware that what they were signing was thicker than a single sheet of paper would be, they are quite unable to say whether or not the lists were under the paper, or enclosed in the paper, which they were signing. After they had gone, the testator put the document or documents, as the case may be, into the drawer of his writing-table, saying that it was his will. Between that date—namely, Apr. 6—and May 12, when he was taken ill, the testator was from time to time in the dining-room. When he was there, he usually used the writing-table, but he

F

G

H

was not there very often. On May 12, he was taken ill, and on May 19 by his direction there was carried up to his bedroom the drawer in which the document had been deposited. He took the drawer and put into an envelope, along with another document not material for the present purpose, the documents now before me in book form. Whether or not they were in this precise order I do not know. At any rate, they were all put into that envelope together. On those facts, the question is whether or not I am satisfied that what I have called the lists were in existence at the time that he executed the will. There is no direct evidence from anybody that the documents were seen. What evidence there is must, therefore, be circumstantial. Is it sufficient to satisfy me, or does it leave me in real doubt as to whether or not they existed? I have to take all the facts of the case together, not excluding, it seems to me, the circumstances which I have mentioned when the will was put in an envelope. The body of the will contains no disposition of property at all, if one excludes the lists. It provides as follows:

I give devise and bequeath all my real and personal estate whatsoever where-soever situate among the following persons and I hereby appoint executors to this my will.

Thus, it is only by incorporating the lists that the will has any dispositive effect, and the testator must have realised that fact. Did he then intend to make the lists at some later date, and carry out his intention? If so, what was he writing during those two hours? I cannot conceive that he was occupied only with that page which he subsequently executed as his will, for that could not possibly have taken him so long. If that page was all that he wrote that morning, why should he delay summoning the witnesses for so long? These considerations leave me in no doubt but that he wrote the will and the lists before telephoning for the witnesses, and that the lists were in being when the will was executed.

The next question is whether the lists are sufficiently identified and referred to by the will. First of all, it is said that there is no reference to any document at all in the will. It is said that one cannot read the words "the following," and so on, as a reference to any document at all. I do not think, however, that that observation is well-founded. One must not tear things from their context. What is the operative part of the document: "I give and bequeath . . . to the following persons"? Is there there an indication of the existence of any document? I think that there is. "The following persons" connotes some list of their names.

The next question is whether or not the lists in question are identified as those connoted by the will. If they are merely lists of names and sums of money, it would be difficult and perhaps impossible to identify them by looking only at the documents. However, they contain more, for I find that they begin with the statement: "I wish to leave the following amounts." This is, sufficient I think, to establish a cross-reference between those words and the words of the will which I have quoted,

"I give and bequeath to the following persons," so as to connect them, just as an asterisk in the will and a corresponding mark on the document sought to be incorporated have been held to do. As was pointed out at the bar, the circumstances might have been such that those words referred to other documents. No other list of persons intended to benefit by the disposition has been shown to exist, or ever to have existed. That is a circumstance which is not only extremely strong in itself, but which, on the authorities, has been recognised by the highest court as being so. In those circumstances, I have no hesitation at all in saying, first of all, that the lists were made before the will, and for the purpose of implementing it, and, secondly, that there is a reference to such lists saying that it was intended to incorporate it, and that the lists are sufficiently identified. In those circumstances, I pronounce for the will including the undated paper writing.

Solicitors: *Campbell, Hooper & Todd* (for the plaintiff); *Treasury Solicitor* (for the defendant); *Eland, Nettleship & Butt* (for the parties cited).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

Re AN ARBITRATION BETWEEN PERRY AND LONDON PASSENGER TRANSPORT BOARD.

[KING'S BENCH DIVISION (Atkinson, J.), **March 30, 31, 1939.**]

Public Authorities—Transfer of officers—Compensation—Transfer of employee of London County Council tramways to London Passenger Transport Board—Weekly servant—Right to and assessment of compensation—Consideration of earnings since dismissal—London Passenger Transport Act, 1933 (c. 14), s. 73, Sched. 14, para. 4 (e).

The applicant was employed as a blacksmith by the London County Council in connection with their tramway undertaking from Apr. 30, 1928, until Nov. 25, 1931, when he was given a week's notice. He was unemployed until Apr. 25, 1932, when he was again employed at his old job. On July 1, 1933, he passed, by virtue of the London Passenger Transport Act, 1933, into the employ of the respondent board, and thereafter continued doing the same work until Jan. 6, 1937, when he was dismissed. His dismissal occurred, not through any fault of his own, but because, owing to the changing over from trams to trolleybuses, there was no further work for him. The applicant commenced arbitration proceedings, claiming that, as he was in the employ of the respondent board on Mar. 12, 1931, he was, by sect. 73 of the Act of 1933, entitled to compensation for having lost his employment. It was contended for the respondent board (i) that sect. 73 did not apply to the applicant because he had not been continuously employed by the London County Council from Mar. 12, 1931, to July 1, 1933, and (ii) that he had been put in no worse a position by the passing of the 1933 Act, in that he had always been subject to a week's notice, and that, therefore, he was not entitled to compensation. It was contended for the applicant that the arbitrator, in assessing any compensation due, was not entitled to take into consideration any earnings the applicant had made in other employment subsequent to his discharge by the respondent board:—

HELD: (i) the Act states in plain terms that it applies to persons employed on Mar. 12, 1931, and July 1, 1933, and the court has no

power to read into those plain words a qualification that the employment must be continuous throughout the time between those two dates.

(ii) the mere fact that a man can be discharged at a week's notice does not take him out of the definition of "an existing servant," or out of the Act.

(iii) the arbitrator has to consider all the circumstances of the case with the object of acting fairly between the parties, and one of the matters he must consider is what the applicant has been earning since his dismissal. A

[EDITORIAL NOTE.] Statutes providing for the transfer of officers from one public body to another are now frequently enacted, and the point of construction here decided is for this reason of some importance. The Act required that the officer should have been in the employment of the transferring authority on two specified dates about 2 years apart, but did not expressly state that the officer was to be continuously employed by the transferring authority during the interval between those dates. The officer in the present case was in fact not in such employ for about 6 months of the period. The court has decided that the Act must be strictly construed, and, as continuous employment between those dates is not mentioned in the Act, such continuous employment is not essential for the award of compensation. Apart from the question of construction, the other matters considered are of great importance—namely, the right of a weekly servant to compensation and the fact that earnings after dismissal are to be taken into account in assessing the compensation. B C

AS TO COMPENSATION FOR LOSS OF OFFICE, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 306-310, paras. 634-641; and FOR CASES, see DIGEST, Vol. 38, pp. 139-143, Nos. 1031-1063.] D

Cases referred to :

- (1) *Crawford v. Spooner* (1846), 6 Moo. P.C.C. 1; 42 Digest 677, 885.
- (2) *Gwynne v. Burnell* (1840), 7 Cl. & Fin. 572; 42 Digest 677, 882.

SPECIAL CASE STATED by the standing arbitrator under the London Passenger Transport Act, 1933. The facts are fully set out in the judgment. E

N. L. C. Macaskie, K.C., and *M. R. Nicholas* for the claimant.

W. Craig Henderson, K.C., and *N. R. Fox-Andrews* for the respondents. F

ATKINSON, J.: This case raises three points of great difficulty. When the London Passenger Transport Act, 1933, determined that a great number of undertakings should be taken over by the new board, the Act contained provisions for giving to persons who should lose their employment compensation for the loss which they might suffer. The applicant in this case, Perry, claimed that he was entitled to compensation because he lost his employment, as he says, as a result of this Act. G

The facts as found in the case are quite short. The applicant was in fact employed by the London County Council. On Apr. 30, 1928, he was employed by the council as a blacksmith at their Charlton works, which were concerned with tramways. He was first employed on Apr. 30, 1928, and continued in that employment until Nov. 25, 1931, when he received a week's notice. He was out of employment until Apr. 25, 1932, a period of about 5 months. On Apr. 25, 1932, he again became a servant of the London County Council, and he was employed at his old H

job. He was still so employed on July 1, 1933, which is the date which is spoken of as the appointed day. He then passed, by virtue of the Act, into the employ of the board, and he remained in the same work until Jan. 6, 1937, when he was dismissed, not through any fault of his own, but because, owing to the changing over from tramcars to trolleybuses, there was no work for him, and he claims that he is entitled to compensation as a result of that dismissal.

The three points which are raised by the case are these. It is first said by the board, the respondents to the arbitration, that the applicant was not a servant entitled to compensation within the Act, and, secondly, that, even if he were a servant who had a right to apply, in the circumstances of this case he was not in fact entitled to any compensation. The point raised by the applicant, which has been decided against him by the arbitrator, is that, if it is right that he is entitled to compensation, and it becomes a question of how much, the arbitrator was not entitled to consider any salary or earnings that he may have made in any subsequent employment.

The first point is one of some difficulty, but I think that a careful consideration of the relevant words in the section shows that really there is not much doubt about it. The point rests upon the proper meaning to be given to sect. 73 of the Act of 1933. Sect. 73 (1) is concerned with defining who is to be deemed an existing servant, because unless one is an existing servant one does not get the benefit of the later provisions. In considering this, I think that one has to remember what appears in CRAIES ON STATUTE LAW, 4th Edn., pp. 71, 72, which has been relied upon for different purposes by both sides :

In *Crawford v. Spooner* (1), the Judicial Committee said [p. 9]: "We cannot aid the legislature's defective phrasing of the Act; we cannot add, and mend, and, by construction, make up deficiencies which are left there." In other words, the language of Acts of Parliament, and more especially of modern Acts, must neither be extended beyond its natural and proper limits, in order to supply omissions or defects, nor strained to meet the justice of an individual case. "If," said LORD BROUGHAM, in *Gwynne v. Burnell* (2) [p. 696], "we depart from the plain and obvious meaning on account of such views [as those pressed in argument on the Taxation Commissioners' Duties (Consolidation) Act, 1803], we do not in truth construe the Act, but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it."

Bearing that in mind, what does sect. 73 of the Act of 1933 say? It provides as follows :

(1) The provisions of this section shall apply in relation to any person who (a) was on Mar. 12, 1931, an officer or servant of a local authority, company or person specified in the second schedule to this Act [a transferring authority] . . .

Of course, the London County Council was such a transferring authority, and the applicant was, as I have said, in their employ on Mar. 12, 1931, so that he fulfils that condition. Then the section continues as follows :

. . . and (b) either (i) was on the said date occupied in or in connection with the undertaking or . . . the part of the undertaking transferred by this Act . . . or (ii) between the said date and the appointed day became so occupied on being transferred by his employers from other duties, such transfer being reasonably necessary in the ordinary course of the management of their business ; and (c) was

immediately before the appointed day an officer or servant of that authority, company or person, and solely or mainly so occupied as aforesaid.

Thus, the third essential qualification is that, immediately before the appointed day—which appointed day was July 1, 1933—he was employed by the London County Council on an undertaking which was being transferred by the Act. Therefore, if the ordinary meaning is given to the words **A** in this section, he fulfils every necessary qualification. He was employed on Mar. 12, 1931. It was an undertaking which was to be transferred. He was so employed immediately before the appointed day. On the face of it, one would have thought that there was an end of it. He fulfils the qualifications which are carefully laid down, and, therefore, **B** he would be an existing servant. The respondents, however, say, that this is not so. I have in some way to discover what they say Parliament must have intended. They say that it must have been intended that he should have been at any rate, in the employ of the county council for the whole of the time between the two dates—namely, Mar. 12, 1931, and the **C** appointed day in 1933. I do not think that Mr. Craig Henderson goes so far as to say that it was necessary for the applicant to be employed on a particular undertaking at the time of the transfer of the undertaking. The first reply to that, of course, is that the Act does not say so, and the next is that it would have been quite easy to have said so if that had been **D** intended. I do not know what warrant there is for saying that Parliament meant that, but they have not said it. Mr. Craig Henderson relies very much on the second part of sect. 73 (1) (b), but I think that the second part of sect. 73 (1) (b) tells more against him than for him, when one comes to look at it, because the effect of that is that, so long as he was in the employ **E** of the county council on Mar. 12, 1931, even if he had been employed as a roadsweeper on that date, and if before the appointed day he had become employed on an undertaking to be transferred, he would be within the definition. In other words, this clearly contemplates that someone who had no more to do with the tramway system than I have, but who was **F** merely put on to that work a fortnight before the appointed day, would become an existing servant, provided that he had been in their employ in some other capacity since Mar. 12, 1931. If it is intended that somebody can be deemed to be an existing servant who has been employed on a transferred undertaking for a fortnight, and if he is to be within it, **G** it would seem very strange that somebody who had been employed on the work from Apr. 30, 1928, to Nov. 25, 1931, and again from Apr. 25, 1932, to July 1, 1933, is to be outside the definition of an “existing servant” for the purposes of the definition merely because he had been out of their employ for a few months. Once one begins to speculate on **H** what Parliament must have meant, or might have meant, I do not know where one will end. I think that this is essentially one of those cases where one has to take the language used and apply it in its natural grammatical meaning. Doing the best I can with it, I think that the claimant here does satisfy every one of the conditions laid down

there, and that it is wholly impossible for me to read into this section a further essential qualification—namely, that he shall have been employed by the London County Council for the whole of the period between the two dates in some capacity or other. I think that that would lead to just as much hardship, and to just as many extreme cases, or absurd cases, to quote Mr. Craig Henderson, as would the other interpretation, and I cannot myself see any justification for acceding to the respondents' arguments with regard to that. Therefore, on the first point, I say that the arbitrator decided rightly.

The second point is apparently ill-expressed in the award, because the wording of the question put is as follows :

That inasmuch as the applicant was not in any worse position in respect to the conditions of his service with the board as compared with the conditions of his service with the London County Council he was not in law entitled to any compensation under the said section.

If that is to be read in the words used, it is a wholly irrelevant argument, because any claim in respect of changed conditions arises under subsect. (4), and has nothing whatever to do with the pecuniary loss arising on discharge. Mr. Craig Henderson tells me that the real argument which he used, and on which that is based, was under sect. 73 (7), which is, of course, the subsection on which the claim is based. It provides as follows :

If within 5 years after the appointed day . . . (b) the services of any existing . . . servant are dispensed with by the board because his services are not required . . . that . . . servant shall, unless the contrary is proved, be deemed for the purposes of the last preceding subsection to have suffered a direct pecuniary loss in consequence of this Act.

In other words, although he was discharged within 5 years after the appointed day through no fault of his own, there is only a presumption that he suffers a pecuniary loss in consequence of the Act, but that presumption can be rebutted. The argument is that, if one looks at the terms of his employment, one can see that he really did not suffer any loss in consequence of the Act. He was employed on the usual terms, subject to a weekly notice, and it is said that, if a man is employed subject to a weekly notice, the very terms of the employment contract displace the presumption which would otherwise arise of there being a pecuniary loss in consequence of the Act. I do not think that that argument is sound. I do not think that the mere fact that a man can be discharged at a month's notice takes him out of the definition of an "existing servant," or out of the Act. I do not think that there is any warrant for that at all. It is quite clear that his dismissal was a consequence of the Act, because Mr. Craig Henderson has told me that the county council had no powers of changing over from tramcars to trolleybuses. It was only a power which came into existence as a result of the Act, and so the cause which led to his dismissal was a direct consequence of the Act. Therefore, I think that that point fails.

The other point is a point which has worried me a great deal. It was raised by the claimant, but it did not find favour with the arbitrator.

The relevant facts for raising this point were these. Immediately after his discharge, the applicant, who had earned only £4 per week, was employed at the Woolwich Arsenal until Mar., 1938, as a gun forger at an average weekly wage of £9. Since that date, in the same employ, he has been employed as a blacksmith at the wage of £3 12s. per week. The arbitrator has had regard to his subsequent earnings. What the arbitrator says is that the rules relating to the way in which the compensation is to be arrived at are contained in the fourteenth schedule. One of those says that the maximum compensation payable shall not : A

... exceed the amount which under the Acts and rules relating to Her Majesty's civil service and in force on Aug. 13, 1888, would have been payable to a person on abolition of office [and the maximum sum payable would have been £300.] B

The arbitrator says that, if he is not entitled to take into consideration the claimant's subsequent earnings, he will award the £300, but that, if he is entitled to take into consideration the subsequent earnings, he awards only £100. He decided that he was entitled to take the subsequent earnings into consideration, and he awarded £100. It is said that that is a matter which the arbitrator was not entitled to consider. The argument rests really on para. 4 of the fourteenth schedule, which provides as follows : C

For the purpose of determining whether compensation should be granted to any person under the provisions of this section, and if so, the amount of that compensation, regard shall be had to . . . D

(e) the emoluments which he has, or might have, acquired by accepting other employment offered him by the board, or by the authority, company or person from whose service he was transferred to the board; and (f) all the other circumstances of his case. E

Of course, *prima facie*, subsequent earnings would come within subpara. (f), "all the other circumstances of his case," and I suppose that, if one looks at it from the commonsense point of view, when one comes to consider the loss which a man has sustained by losing his job, one of the most relevant matters to consider is what he got in its place, and what he has been earning since. Here it is quite obvious that he dropped into employment by an employer—namely, the government (he could not have had a more stable employer), at Woolwich Arsenal, which I suppose is as stable a branch of production, especially nowadays, as one could imagine. At first he was engaged on a branch of work rather higher than that to which he was accustomed, and now he is on his old job of work, the work of a blacksmith. It seems really contrary to commonsense to say that, in estimating a man's loss, all that is something which cannot be considered, but at any rate it is said that the arbitrator could not consider it because of that which is contained in para. 4 (e). It is said that there the only emoluments that are referred to are the emoluments which he has had, or might have had, by accepting other employment, either from the board or from the county council. The argument is that the subsequent emoluments which may be considered have been carefully defined there, and that, therefore, subpara. (f) must be construed in such a way F G H

as not to remove the limits which it is said that subpara. (e) has imposed upon the emoluments which may be taken into consideration. I do not think that the argument is sound. There may be some good reason for dealing with that particular kind of emolument.

A It is to be noted that in the Local Government Act, 1929, on which this section, I should think, was founded, the corresponding provision, which is in the eighth schedule in para. 1 (e), (f), refers only to :

(e) the emoluments which he might have acquired if he had not refused to accept any office offered by any council acting under this Act; and (f) all the other circumstances of the case. . . .

B There is perhaps a very good reason for putting that in to make it quite clear that, if he had chosen to refuse an offer from his old employers, that was a matter which might be taken into consideration, and which would not create any difficulty, but of course the difficulty here is that Mr. Macaskie relies upon the fact that there have been inserted in the London Passenger Transport Act, 1933, in Sched. 14, para. 4 (e), after the words, "the emoluments," the words "which he has, or might have, acquired." He says that, where there is a subsection specifying and setting out specifically that one must consider emoluments which he has received from his old employers, or from the board, one cannot extend

C the class of emoluments which have to be considered. I think that I cannot limit the words in that way. Subpara. (f) speaks of "all the other circumstances of his case." It is not easy, but, if one gives the fair meaning to those words, the arbitrator has to consider everything with the object of acting fairly between the parties, and it seems to me that

E it would be acting very unfairly, from one point of view, to leave out of consideration the fact that he has been earning practically as much ever since. Therefore, I answer all the questions in the same way as that in which the arbitrator did.

F Solicitors : *W. H. Thompson* (for the claimant) ; *Bircham & Co.* (for the respondents).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

G SUPERMA, LTD. v. TENCONI.

[CHANCERY DIVISION (Morton, J.), **March 14, 15, 1939.**]

H *Patent—Action for infringement—Counterclaim for revocation—Order for affidavit of documents—Failure to comply with order—Defence and counterclaim struck out—Trial of action—Certificate of validity—Certificate that particulars of breaches were reasonable—Whether action "proceeded to trial"—Patents and Designs Acts, 1907-1938, s. 35—R.S.C., Ord. 31, r. 21—R.S.C., Ord 53A, r. 20.*

The plaintiffs brought an action claiming damages for the infringement of their letters patent. The defendant counterclaimed for revocation of the patent. The defendant was ordered to file an affidavit of documents, but failed to comply with that order, and it was therefore ordered that his defence and counterclaim should be struck out. The

action came on for trial, and the plaintiffs asked for a certificate that the validity of the patent had come in question, evidence tending to establish validity having been tendered. The plaintiffs also asked for a certificate that particulars of breaches were either proven or reasonable and proper :—

HELD : (i) in the events which had happened, the defendant had been placed in the same position as that in which he would have been if he had not defended. The matter was, therefore, before the court with no defence, and an undisputed statement of claim. It could not, therefore, be said that the question of validity had ever been in question, and the plaintiffs were not entitled to a certificate of validity.

(ii) there had been no trial of the issues raised in the action, so that it could not be said that the action had "proceeded to trial" within the meaning of R.S.C., Ord. 53A, r. 20. The plaintiffs were, therefore, not entitled to the certificate that the particulars of breaches were reasonable, and the costs of the issues raised by these particulars were in the discretion of the taxing master.

[EDITORIAL NOTE.] In order that a certificate of validity may be given it is essential that the matter of the validity of the patent must have been tested. In the present case, the defence and counterclaim having been struck out, it was not the plaintiffs' fault that there had been no contest, but that consideration did not prevent their right to a certificate being defeated by the fact that the matter had not been contested. It might, however, have been otherwise, if, at the time the action was called on, there was still a defence on the record, although the defendant did not appear.

AS TO CERTIFICATE OF VALIDITY see HALSBURY, Hailsham Edn., Vol. 24, pp. 693-695, para. 1294; and FOR CASES, see DIGEST, Vol. 36, pp. 826-830, Nos. 3103-3149. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 524, 525.]

Cases referred to :

- (1) *Brooks (J. B.) & Co., Ltd. v. Lycett, Ltd.* (1903), 20 R.P.C. 390; 36 Digest 830, 3147.
- (2) *Blatchford v. Cory & Grundy, Ltd.* (1921), 38 R.P.C. 412; 36 Digest 830, 3136.
- (3) *Descombes & Arondel v. Lestor & Parton* (1931), 48 R.P.C. 473; Digest Supp.
- (4) *British Foreign & Colonial Automatic Light Controlling Co., Ltd. v. Metropolitan Gas Meters, Ltd.* (1911), 29 R.P.C. 209; 36 Digest 754, 2383; *affd.* (1912), 29 R.P.C. 571.
- (5) *Babcock & Wilcox, Ltd. v. Water Tube Boiler & Engineering Co., Same v. Edwin Danks & Co. (Oldbury), Ltd.* (1910), 27 R.P.C. 626; 36 Digest 831, 3158.

ACTION for infringement of letters patent. The case is only reported on the question whether it was a proper case for the grant of the certificate asked for. The facts of the case are fully set out in the judgment.

G. W. Tooke for the plaintiffs.

The defendant was not represented.

MORTON, J. : This action relates to a patent for curling and waving the hair of persons who desire to have that process carried out. It raises a question of some importance as to the construction of the Patents and Designs Acts, 1907-1938, s. 35. The writ in this action was issued on Dec. 3, 1937, and by the writ the plaintiffs claim an injunction to restrain the defendant, his servants and agents, from infringing the

patent which I have mentioned, No. 225,256. It also claims an inquiry as to damages and delivery up and costs. The statement of claim was delivered on Dec. 21, 1937. It is alleged therein that the plaintiff Peter Sartory is the registered legal owner of the patent in question and that the plaintiffs Superma, Ltd., are exclusive licensees under those letters
A patent. By para. 2, it is alleged that the letters patent are valid and subsisting. By para. 3, it is alleged that the defendant has infringed, and threatens and intends to infringe, the letters patent in manner appearing in the particulars of breaches, and the plaintiffs claim the same relief in substance as the relief claimed by the writ. On Feb. 2,
B 1938, the defendant delivered his defence. Para. 2 is as follows :

Letters Patent No. 225,256 is and at all material times has been invalid by reason of the matters in the herewith delivered particulars of objections appearing.

Then there followed a counterclaim whereby the defendant repeated
C para. 2 of his defence and counterclaimed for the revocation of the letters patent. The particulars of objections cover a wide field, and I need not refer to them in detail.

An order was made on June 30, 1938, whereby, *inter alia*, the defendant was ordered to make and file a full and sufficient affidavit as to whether
D or not he had in his possession or power any, and, if any, what, documents relating to the matters in question in this action and counterclaim, and account for the same. The action was set down in the witness list before Jan. 25, 1939. On Jan. 25, 1939, the defendant having failed to
E comply with that portion of the order of June 30 which relates to the delivery of an affidavit of documents, it was ordered that the defence and counterclaim delivered by the defendant on Feb. 24, 1938, be struck
F out, and that the defendant be placed in the same position as that in which he would have been if he had not defended or counterclaimed in this action. That order was made in accordance with the provisions of R.S.C., Ord. 31, r. 21, which are as follows :

If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall
also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the
G same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly.

It is to be observed that the effect of the order of Jan. 25, 1939, was that
the defendant was placed in the same position as that in which he would have been if he had not defended. The defence and counterclaim were
struck out, so that the position is that there is no defence and no counter-
H claim. The action has now come on for trial, and counsel for the plaintiffs has asked me to give a certificate under the Patents and Designs Act, 1907-1938, s. 35, that the validity of the patent came in question. He tendered evidence to establish the validity of the patent in case I should think that I could give a certificate under the section.

The first question which arises is whether or not the validity of any

claim of this patent came in question within the meaning of sect. 35 ? If it did not, it would, of course, be quite wrong to grant the certificate for which the plaintiffs ask. Counsel for the plaintiffs has referred me to three cases. The first of these was *Brooks (J. B.) & Co., Ltd. v. Lycett, Ltd.* (1). That was a case before BUCKLEY, J., in which the validity of the patent was denied in the pleadings, but the defendant A did not appear at the trial. The allegations in the statement of claim being denied, evidence was called by the plaintiffs to prove their case, and BUCKLEY, J., granted an injunction and other relief. On the following day, counsel for the plaintiffs asked for a certificate that the validity of the patent came in question in the action, and the following B observations followed [p. 392] :

BUCKLEY, J. : I presume the validity was disputed by the defence ?—Yes. And there was evidence given as to the patent being valid ?—Yes.

On that, BUCKLEY, J., granted the certificate. It would appear that BUCKLEY, J., attached importance to the fact that the validity of the C patent was disputed by the defence. The next case is *Blatchford v. Cory & Grundy, Ltd.* (2). In that case, the validity of the patent was denied on the pleadings, but, when the matter came to trial, it was D stated by counsel for the plaintiffs that the parties had come to terms on the basis of the defendants accepting a licence and giving an under-taking until the grant of it. Counsel then stated that he proposed to call evidence as to the validity of the patent, and to ask for judgment on terms which had been put into writing and for a certificate of validity. P. O. LAWRENCE, J., as he then was, asked, at p. 412 : E

Is it the practice to grant a certificate unless there has been a real contest ?—Yes, when the parties have been at arm's length, as they have been here until the trial.

Evidence was then given to the effect that the patents were valid, and P. O. LAWRENCE, J., granted the certificate which was asked for. It is to be observed that here, again, the validity of the patent was denied F upon the pleadings, and the parties came into court with that denial on the record. The last case was *Descombes & Arondel v. Lestor & Parton* (3), and in that case, again, the validity of the patent was disputed on the pleadings. At the hearing, however, counsel for the defendants said, at p. 473 : G

As a result of reports made by expert witnesses acting for the defendants, I have advised the defendants that they cannot hope to succeed on the issue of invalidity, and I do not now propose to contest the validity of the letters patent in suit.

Then counsel for the plaintiffs asked for a certificate under sect. 35, and said that there was authority for granting such a certificate where the H defendants had appeared and submitted to judgment. He suggested that the court ought to be satisfied that there had been no collusion between the parties. An expert witness was called, and EVE, J., said, at p. 474 :

I think on that evidence the plaintiffs are entitled to a certificate of validity.

Counsel for the plaintiffs has also referred me to a passage in FLETCHER-MOULTON ON THE LAW AND PRACTICE RELATING TO LETTERS PATENT FOR INVENTIONS, p. 199, which contains a useful summary of the decisions under sect. 35.

- A I can appreciate that, when, at the time the action comes on for hearing, there is still an allegation of validity in the statement of claim and a denial of validity in the defence, it may well be said that the validity of the patent has come in question notwithstanding the fact that at the hearing there was no attack made upon the validity of the patent, the defendant either failing to appear or appearing and saying that he could not contest the validity. Nevertheless, in the present case, in my view, it would not be right to say that the validity of any claim in the specification of this patent came in question. When one has regard to the terms of R.S.C., Ord. 31, r. 21, in the events which have happened, the position is that the defendant in this action is in the same position as that in which he would have been if he had not defended, and, when the matter comes before me, there is no defence and no counterclaim, but merely a statement of claim which contains allegations which are not disputed, I do not think that the present case comes within the wording of the Patents and Designs Act, 1907-1938, s. 35, and for this reason I do not propose to grant the certificate asked for, as I think that the statement in such certificate would not be accurate.

- A further question has arisen in this action—namely, whether, in the circumstances which I have already detailed in my judgment, this action has proceeded to trial within the meaning of R.S.C., Ord. 53A, r. 20. If the action did not proceed to trial within the meaning of that rule, the costs of the issues raised by the particulars of breaches would be in the discretion of the taxing master. The position is that I have given judgment in favour of the plaintiffs, but, owing to the absence of any defence, there has been no trial of the issues in the action. In my view, in those circumstances, the action has not proceeded to trial within the meaning of the rule. Counsel for the plaintiffs has referred me to two cases before WARRINGTON, J., as he then was. The first is *British Foreign & Colonial Automatic Light Controlling Co., Ltd. v. Metropolitan Gas Meters, Ltd.* (4), where, at p. 306, WARRINGTON, J., states the effect of R.S.C., Ord. 53A, r. 22. That rule was in terms similar to those of what is now R.S.C., Ord. 53A, r. 20. WARRINGTON, J., states the reason for this rule in the following terms, at p. 306 :

- H The reason of course is obvious, and it is this : that unless an action is fought out—that is to say, unless the trial is actually proceeded with—the judge has no means of determining whether the particulars of objections are reasonable or not, and accordingly the rule in that case leaves it to the taxing master to look into them, and to say whether they are, or are not, reasonable, and whether the costs ought to be allowed.

I entirely accept that statement of the reason for the rule. Further light is thrown on the matter by the judgment of WARRINGTON, J., in *Babcock & Wilcox, Ltd. v. Water Tube Boiler & Engineering Co.* (5).

In that case, the plaintiffs, when the action came on for trial, submitted to judgment for the defendants with the costs of the action, so that in that case there was a judgment, just as there is in the present case. WARRINGTON, J., said, at p. 628 :

The consolidated actions come on for trial, but do not proceed to trial, because as soon as the actions are called on, the plaintiffs state that they submit to judgment for the defendants with costs. That seems to me to be a case falling within R.S.C., Ord. 53A, r. 22; namely, that the action does not proceed to trial. A

I can see no real distinction between the case to which I have just referred and the present case. The action came on for trial, but did not proceed to trial in the sense that the issues had to be tried and determined, because there was no defence on the record. In these circumstances, B
I think that it is clear that under R.S.C., Ord. 53A, r. 20, this particular action has not proceeded to trial within the meaning of the rule, and the costs of the issues raised by the particulars of breaches are in the discretion of the taxing master. C

Solicitors : *Berrymans* (for the plaintiffs).

[Reported by E. FULLER BRISCOE, Esq., *Barrister-at-Law.*]

POOL SHIPPING CO., LTD. v. LONDON COAL CO. OF GIBRALTAR, LTD. D

[KING'S BENCH DIVISION (BRANSON, J.), **March 21, 22, 30, 31, 1939.**]

Contract—Performance—Excuse for non-performance—Exceptions clause—“Normal working of the contract”—Consideration of commitments under other contracts—Shortage of supply. E

The defendants agreed to supply all the plaintiffs' steamers with such quantities of Welsh or Durham bunker coal at Gibraltar as were normally required by such steamers coaling *en route*, in the customary manner, between Jan. 9, 1937, and Dec. 31, 1937, and the plaintiffs agreed that all such steamers calling at Gibraltar should take their entire requirements from the defendants. Clause 7 of the agreement provided as follows : “In the event of any cause or circumstance beyond the control of the sellers and/or suppliers of whatsoever description and wheresoever occurring (including without limiting the general exceptions strikes or lockouts) . . . which prevents the supply, shipment, carriage or delivery of all or any one or more of the descriptions of coal herein contracted for (and whether comprised in an option or not), or the normal working of this contract, sellers or suppliers shall be entitled to relief from all obligations under this contract during the continuance of any such causes or circumstances or the effects thereof unless this contract be modified by mutual agreement.” By taking statistical averages, the defendants estimated such demands for bunkers as ships were likely to make upon the depot at Gibraltar at 18,600 tons per month. This estimate was, however, incorrect for March, April, May and June, 1937, owing to government pressure upon the collieries and public utility companies to bring up their supplies of coal to full capacity, and to an unexpected and sudden boom in shipping. In September when coal was needed for one of the plaintiffs' ships, it was not all supplied under the contract and the plaintiffs were forced to pay £49 2s. 7d. in excess of the contract price :— F

HELD : (i) in construing the phrase “normal working of the contract,” the court was entitled to look beyond the buyer and seller and consider G H

the seller's commitments under contracts with other buyers, and, in the circumstances, the normal working of the contract was prevented.

(ii) the contract must be construed in a business sense, and, as the effects of the circumstances which had arisen in March and April were still continuing when the ship came for its coal in September, and, as those circumstances were still operating in September to prevent the normal working of the contract, the contract was still suspended at that time.

[EDITORIAL NOTE. The basic rule of the law of contract is that contractual obligations must be fulfilled, and it is no excuse that contracts with third parties prevent the fulfilment. However, in the case of a business contract, it is possible by a properly drafted exceptions clause to provide for a consideration of the general commitments of a seller in certain defined circumstances. In the present case, the restriction of supply was not so great that it would have prevented a supply to the plaintiffs of the quantity contracted to be supplied, but such a supply could only have been given by the non-performance of obligations under other contracts. It is held that the defendants were entitled, provided the shortage was due to causes beyond their control, to equalise the shortage of delivery among all their contracts. This is what is called the "normal working of the contract," and, in the circumstances of this case, this normal way of carrying out the contract is held to be the correct method, and one which the defendants were entitled to adopt.

AS TO DELIVERY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 126-136, paras. 153-167; and FOR CASES, see DIGEST, Vol. 39, pp. 559-561, Nos. 1664-1685.]

Cases referred to :

- (1) *Tennants (Lancashire), Ltd. v. Wilson (C. S.) & Co., Ltd.*, [1917] A.C. 495; 12 Digest 396, 3216; 86 L.J.K.B. 1191; 116 L.T. 780; *revsg. S.C. sub nom. Wilson & Co. v. Tennants (Lancashire), Ltd.*, [1917] 1 K.B. 208.
- (2) *Gardiner v. Macfarlane, M'Crindell & Co.* (1889), 16 R. (Ct. of Sess.) 658; 41 Digest 345, case 1957 ii.

ACTION to recover £492s. 7d. as money had and received to the plaintiffs' use or alternatively as money paid on a consideration which had failed or alternatively as money overpaid under protest, or alternatively as damages for breach of contract. The defendants pleaded that that sum had been properly paid by the plaintiffs to them in accordance with the exception clause in a contract for the supply of coal by them to the plaintiffs. The facts are fully set out in the judgment.

Sir Robert Aske, K.C., and *C. T. Miller* for the plaintiffs.

A. T. Miller, K.C., and *A. A. Mocatta* for the defendants.

BRANSON, J. : This action raises a question of construction in the main, and, as I understand it, it is in the nature of a test action. The plaintiffs sue the defendants upon a contract dated Jan. 9, 1937, made between Sir Robert Ropner & Co., Ltd., acting on behalf of the plaintiffs, and Messrs. Lambert Brothers, Ltd., acting on behalf of the defendants.

Under that contract, it was agreed (stating it quite broadly) that the defendants should supply to the plaintiffs during 1937 such quantities of bunkers as the plaintiffs' ships might ask for at Gibraltar. The plaintiffs and the defendants having made that contract, it appeared in the early part of Feb., 1937, that conditions in the coal trade were becoming such that it was very difficult to obtain supplies, and, without at the moment

going through the letters in detail, it is sufficient to say that in May, 1937, Messrs. Lambert Brothers, Ltd., acting for the defendants, wrote to Sir Robert Ropner & Co., Ltd., acting for the plaintiffs, and informed them that :

. . . owing to the present abnormal position of both the coal and shipping trade our principals at those ports drawing supplies from this country foresee that it will be no longer possible to keep their depots sufficiently supplied with the Welsh and Durham coals called for by the contract. A

In those circumstances, they suggested that the contract had been suspended by virtue of the exception clause contained in it. They offered, nevertheless, to supply to ships which called at these foreign coaling ports one-third of each vessel's requirements of what was called emergency coal—that is to say, coal which was not coal covered by the contract—and to supply that coal at the current price of the day. The plaintiffs protested, but nothing more happened until September, 1937, when notice was given on behalf of the plaintiffs that their steamer Stagpool was going to Gibraltar and was going to call for 200 tons of Welsh coal under the contract. On behalf of the defendants, the answer was made that the defendants would not accept a demand for 200 tons of coal under the contract, but that they were prepared to accept the stem under the emergency arrangements of two-thirds under contract and one-third emergency. The plaintiffs refused to agree that that was a correct view of the legal position between the parties, but the ship was coaled, and the plaintiffs are now suing for the difference between the emergency price which they were made to pay for the one-third of the coal put on board and the contract price of that quantity—namely, the sum of £49 2s. 7d. B
C
D
E

The question turns first upon the true interpretation of the contract between the parties. It is contained in a memorandum of agreement made between the plaintiffs and Lambert Brothers, and it is upon a form headed as follows : F

The London Coal Exporters' Association standard form incorporating amendments resulting from conferences with representatives of the Chamber of Shipping, Nov., 1936.

It contains the following clause, which shows that the heading is part of the contract : G

Should any further amendments be agreed between the London Coal Exporters' Association and the Chamber of Shipping during the currency of this agreement, the parties hereto shall be entitled to the full benefit thereof, and such agreed amendments, if any, shall be deemed to have been incorporated in the terms of this agreement.

Then cl. 1 of the agreement provides as follows : H

The sellers, as agents for the several within-mentioned suppliers [including the defendants] undertake, subject in each case to the written order being placed by the master, in his capacity as such, to supply on the terms hereinafter mentioned at the within-mentioned ports to all the steamers of which the buyers are for the time being registered owners or managing owners (and which are not on time charter to others) such quantities of the hereinafter specified bunker coals as are normally required and taken by such steamers coaling en route in the customary manner.

The only other material clause in that agreement is cl. 7, which provides as follows :

A In the event of any cause or circumstance beyond the control of the sellers and/or suppliers of whatsoever description and wheresoever occurring (including without limiting the general exceptions strikes or lock outs) . . . which prevents the supply, shipment, carriage or delivery of all or any one or more of the descriptions of coal herein contracted for (and whether comprised in an option or not), or the normal working of this contract, sellers or suppliers shall be entitled to relief from all obligations under this contract during the continuance of any such causes or circumstances or the effects thereof unless this contract be modified by mutual agreement.

B Then the port is specified as being Gibraltar, and the coals as being Welsh or Durham, and it is provided that they are to be delivered f.o.b. alongside mole or hulk, at the suppliers' option.

C The first question which has been argued is as to the true construction of the exception clause. It is contended on behalf of the plaintiffs that, upon its true construction, it comes into operation only if it can be shown that the sellers could not, by any precaution which was open to them, have avoided the interference with the working of their business which may in fact have occurred. The suggestion on the part of the defendants is that in the early days of 1937 a completely abnormal set of circumstances arose in the coal trade of this country, and that, in those circumstances, it became impossible for people to do as had been done in past years—namely, to go upon the market and buy cargoes of coal in large quantities, or to contract with collieries to ship coal in large quantities for them to export to the foreign ports. Further, it is said that those circumstances which so arose, whilst it was not argued that they prevented the supply or shipment of the coal contracted for, did prevent the normal working of the contract between the parties.

F It appears to me that what one has to see is, first of all, whether or not there was a cause or circumstance beyond the control of the sellers which operated to prevent the normal working of the contract. I cannot myself agree to the construction which suggests that, if it can be shown that by any precautionary measure, however unusual that measure might be, the sellers could, had they foreseen what was going to happen, have avoided the circumstance which subsequently arose from preventing the normal working of their contract, the clause is to have no effect. I think that what one has to do is to see, first of all, what is the normal working of the contract, and, in order to discover what is the normal working of a contract, one is entitled, in a case of this kind, to look at the evidence as to the way in which this contract, and contracts such as this, are normally operated by the people who have to carry them out.

H It is suggested that I am wrong in that, and that I ought to fix my eyes simply and solely upon this contract, and not to see even what the business of the contracting parties is. To my mind, that leads directly to an inability to fix any normal for the working of the contract. The question may arise on the day after the contract has been signed, and before this contract has ever been put into operation. When one realises,

however, that the words occur in what is called in the contract itself a standard form, it seems to me that the proper way of construing it is to look at the evidence, as the defendants say one should, and see what, in normal circumstances, people do when they have this kind of contract to perform. In that way, one establishes what the normal working of this contract is. One then has to see whether or not any cause or circumstance has affected it, and, if it has, then there is another question—namely, was that cause or circumstance beyond the control of the sellers? If the answer to that, again, is in the affirmative, then the exception clause comes into operation. A

I have been referred to two authorities upon this point. Neither of them is very close to the matter with which I have to deal, but perhaps, as they have been mentioned, it is worth while to look at them and see to what extent, if at all, they touch the point which I have to decide. The first of them was *Tennants (Lancashire), Ltd. v. Wilson (C. S.) & Co., Ltd.* (1). In that case, the defendants, who had contracted to sell to the plaintiffs their requirements of magnesium chloride over 1914, to be delivered in monthly instalments, failed to deliver 240 tons. In an action for damages for breach of contract, the defendants pleaded that they were entitled to suspend delivery under a condition in the contract which provided as follows [p. 496]: B C D

... deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers... causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article.

It was held by all their Lordships that a rise in price would not in itself constitute a hindrance to delivery within the meaning of the condition, and it is conceded here on the part of the defendants that a rise in price would not have brought the exception clause into operation in the present case. There are some expressions in some of their Lordships' opinions which seem to me to have a bearing upon some of the arguments which have been pressed upon me in the present case. For instance, upon the point which was taken in *Tennant's* case (1)—namely, that all that the court should look at was whether or not the sellers were hindered in delivering the requirements of the particular buyer who was claiming—it was held that the court was entitled to look beyond the two people, the seller and buyer, and consider what were the seller's commitments to other people under contracts which existed between them. EARL LOREBURN said, at p. 510: E F G

The evidence in this case was given in a very confused way, but the conclusion of it is that the sellers could not have obtained enough of the chloride of magnesium during the relevant period of time to satisfy the requirements of their business even if they had paid the prices required, but that they could have obtained enough to satisfy their contract with the present respondents if they had disregarded other contracts, and other business necessities in order to satisfy the respondents. To place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery. H

There one has EARL LOREBURN looking at the general business of the

merchant in order to see whether or not the execution of the particular contract was being hindered. LORD ATKINSON used similar language at p. 520 :

The whole argument of the respondents has been directed to show that the appellants could have obtained the 240 tons necessary to fulfil their particular contract, and that the appellants were bound to supply them in preference to all others. The respondents were to get what they contracted for, and, if their contention be sound, the other customers to be left with a cause of action. But the delivery, which might be prevented or hindered, was not the mere delivery to one purchaser amongst many of the quantity purchased by him, but *delivery* under the normal engagements of the appellants' trade to the whole body of the customers to whom they were bound to deliver in the year 1914.

In the same case, LORD SHAW used similar language, at p. 522 :

I think that the right of suspension arose when the contingency began to operate. And my further view is that the operation of the contingency was not limited to the actual prevention of the supply of the particular consignments contracted for, but extended to a hindrance in the delivery of a commercial article in such a way as to interfere with the conduct in a full business sense of the appellants' trade in magnesium chloride.

I think that it is unnecessary to refer to any further passages in the opinions in that case. The ones which I have cited are sufficient to indicate that which was in their Lordships' minds.

Then I was referred to *Gardiner v. Macfarlane, M'Crindell & Co.* (2). The facts in that case were as follow. A charterparty, dated Mar. 12,

1888, provided that a sailing vessel should proceed to Sydney, New South Wales, and there receive from the charterers a full and complete cargo of coal. There was an exceptions clause including strikes, lock outs, or accidents at the colliery directed, or any other hindrances of what nature soever beyond the charterers' or their agents' control. No lay days were

specified, but there was a cancelling date, which was Sept. 30, 1888. When the charter was made, the charterers, in May, 1888, informed their agents at Sydney, the charter having been entered into at Glasgow in Mar., 1888. In May, 1888, the agents wrote to the colliery instructing them to book the Lismore for a cargo of coals. When the Lismore got

out to Sydney, it appeared that, owing to strikes in other collieries, there was a heavy demand for coal at Sydney, and the result was that the colliery which had booked the Lismore for a cargo of coals did not deliver the coals to the Lismore, but delivered them instead to people from whom they could get a higher price. The Court of Session in Scotland appears

to have held that, because the agents did not make a contract binding the colliery at Sydney to provide a cargo for this ship by some definite date, the charterers had failed in their obligations outside the charterparty, and, consequently, could not rely upon the exceptions clause in the charterparty. However, LORD TRAYNER, who delivered the judgment,

did go on to say, alternatively, that, assuming that the providing of the cargo was an obligation within the charterparty, and assuming that it was one to which the exceptions clause applies, still, because the charterers did not contract that the coal should be ready by some specific date, it was their omission to take that precaution which had caused the non-delivery of the coal, and that they had not been hindered within the

meaning of the exception in the charterparty. With the greatest possible respect for the decision of the court, I do not think that it really affects the case which I have to decide. The judgment of one court in one set of facts is very often not helpful to another court in the construction of another contract, but, if I thought otherwise, the case is not binding on me, and, with the deepest respect, I should decline to follow it. It appears to me to be contrary in effect to the decision of the House of Lords in *Tennants (Lancashire), Ltd. v. Wilson (C. S.) & Co., Ltd.* (1), to which I have already referred. Thus, it appears to me that what I have to do is to see whether or not there was in fact a cause or circumstance beyond the control of the sellers which prevented the normal working of the contract.

The normal working of the contract has been spoken to by Mr. Steel, who has worked this type of contract for many years. He told me that his practice was to estimate the demands for bunkers which ships were likely to make upon the depot at Gibraltar, and then to contract with collieries to supply sufficient coal to meet those estimated requirements, and that it was not necessary to do more than that, because, in the normal course of events, there was always the market at the back of the seller, prepared to supply the seller with any amount of coals which the seller might require to replenish his depots. That practice was followed in the present case. The estimated requirements for 1937 were taken at 18,600 tons per month, and the basis of that estimate was that, in the year before, the demands had been 15,400 tons per month from this particular depot. I may say, in passing, that there seems to me no possible means whereby any supplier from a depot, upon a contract of this kind, could fix the amount which he ought to be prepared to supply, except statistically by taking averages and using such business acumen as may be granted to him to prophesy whether the next year will be a better or a worse year for bunkers than the one upon which he is basing his averages. Nobody can tell. The facts with regard to that in the present case are that there are some 330 contracts of this kind entered into by Messrs. Lambert Brothers. No one shipowner is bound to ask for a single ton of coal. The only limit which is placed upon the demands of each individual shipowner is that the quantities are to be those which are normally required and taken by such steamers calling en route in the customary manner. The yardstick is vague in the extreme. If the plaintiffs' contention is correct, it means that every seller under a contract of this kind must, if he is to be at all certain that his exceptions clause is going to be of any use to him, make contracts for the utmost amount of coal that could be demanded by any of the ships. It would be a completely unbusinesslike transaction. In this particular instance, it would have involved contracting for some 220,000 tons of coal to be sent to Gibraltar at the beginning of the year in order that it might be there to be handed out month by month as the ships came in, if any of them did come. The matter has only to be stated to make it appear that that

construction, although it may be the true construction, has at all events a most unbusinesslike result.

The normal way of carrying out this contract was, in my opinion, adopted. The estimated amount of coal which would normally be required having been arrived at, a reasonable margin was allowed. To
 A cover 15,400 tons per month, 18,600 tons per month were contracted for. Again, owing to a combination of circumstances, these estimates were all falsified. There was government pressure put upon the collieries and upon public utility concerns to bring up their supplies of coal, which had been allowed to get somewhat low, to full capacities. The results were, I am
 B quite satisfied by the evidence, that in March, April and May it was impossible to obtain coal from Wales or from Durham in anything like the quantities which would normally be available. It is true that one could get perhaps a few hundred tons, or perhaps 1,000 tons, owing to some ship which was stemmed not keeping her engagement and the
 C colliery having the coal, which would otherwise have been laden on her under contract, available to sell in the market. It cannot be, however, that, in the normal working of a contract of this sort, which is, as I have said, to send out monthly coal obtained under contract from collieries, the sellers should have to go round and pick up 200 tons here and 100 tons
 D there and collect it together and send it out, in order to be enabled to say that they have not been prevented by the shortage from carrying on the normal working of their contract. So to acquire the coal is not the normal way of working the contract. In my view, it is plain that the normal working of this contract was prevented in March, April, May
 E and June.

Then it is said that, granted that that may be so, still, the exception clause does not help the sellers in this case, because the shortage had passed long before the plaintiffs asked for their 200 tons of coal from them. Then the defendants rely upon the next words of the clause,
 F which state that the obligations under the contract are suspended

... during the continuance of any such causes or circumstances or the effects thereof.

What is said is that the state of affairs which obtained in March, April and May was such as to render it a reasonable business step on the part
 G of the defendants to implement their supplies of coal, in order to meet the demand which was then existing, and which appeared to be likely to continue, at least for a while, by getting some coal from elsewhere than Durham or Wales. The evidence before me has satisfied me that, when the defendants bought, as they did buy, two cargoes of coal from West-
 H phalia in February, and another six cargoes on Apr. 27, they were doing that which reasonable business men would do in order to make good the deficiency in their supplies, which was being created by what was, in the circumstances, an abnormal demand for coal. When I was dealing with the question of the demand, I referred to the abnormal demands of public utility companies. It was also admittedly caused by a sudden

boom in shipping, as a result of which ships were asking for a great deal more bunkers than they had asked for in the two or three years previously. I think that it is unnecessary to go into details, but a clear description of the circumstances was given by Mr. Harrison in his evidence. I accept every word of what he said about it, and, if it is necessary that the details should be investigated, they are set out in the shorthand note. A

The defendants say that, having acquired some extra coal as a reasonable business step, taken by them as a result of the abnormal conditions of the coal trade in Apr., 1937, the coal which they acquired then had to be dealt with, and, while that coal had to be dealt with, the cause or circumstance was still affecting the normal working of their business. They had this extra coal, and they had to deal with it. Their case is that, until the state of affairs produced by these extra purchases had been got rid of, the normal working of their business was still being affected by the circumstances which had arisen in March, April and May, 1937. That seems to me to be a correct argument, in the circumstances of this case. I cannot think that the clause was intended to operate in such a way that, the moment that the shortage ceased, all steps which had been taken to meet the shortage, while it existed, should be deemed to have been wiped out, so long as they were still, in a business sense, effectively interfering with the normal course of the working of the contract. That that was the case in the present instance seems to me to have been established by the evidence which has been called before me. B C D

The argument which Sir Robert Aske adduced to meet this point of view simply, as it seemed to me, ignored the word "normal" in this contract, because what he said was: "Never mind what happened in March and April and May. By August, or at all events by the time my ship was at Gibraltar in September, any difficulty in the supply of coal had ceased, and, if the sellers had chosen to take the supplies to which they were entitled under their contracts, they could have had as much coal there in August and September as they needed." It is true that they might have done so, if they had dislocated their business in the matter, and if they had tried to wipe out the effect of the steps which they took in order to supply the depots and to keep the ships going while the supplies of Welsh coal and Durham coal were unobtainable. I think, however, that one must construe a business contract in a business sense, and, that being so, I think that, as a fact, the effects of the circumstances which had arisen in March and April were still operating when the ship came for its coal in September, and, therefore, that the contract was still suspended. E F G H

I was pressed to consider all kinds of results—financial results, perhaps—by which the defendants may have benefited, by being able to charge extra for coal which apparently was delivered to them under their contracts, and at the contract price, but the whole point of the matter seems to me to be this. Here is a contract which is being entered into

to a very considerable extent one-sidedly. That is to say, the sellers are bound to supply to the ships, but the ships are not bound to come to the sellers to get any coal. In circumstances of that sort, one can well imagine that the sellers would seek to be protected from having to deliver coal to people who might be tempted by fluctuations in the market to come to them when they otherwise would not have done so. It is not, of course, an argument which carries much weight either way, but, if one may look on the one side to such considerations as that the result of this construction is that the sellers will be better off than they would have been if their business had not been upset, then that may be set against the other kind of argument, without, as I say, either of them carrying much weight. I have dealt, I think, with all the various points which have been raised, and the result is that, in my view, the action fails, and I must enter judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Temperley, Tilly & Hayward*, West Hartlepool (for the plaintiffs); *Constant & Constant* (for the defendants).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

STIMSON v. STANDARD TELEPHONES & CABLES, LTD.

[KING'S BENCH DIVISION (Hilbery, J.), **March 6, 7, 8, 9, 10, April 4, 1939.**]

Factories and Shops—Statutory duty—Breach—Breach not cause of injury—Dangerous machinery—Fencing—Provision of switch near electrical machinery—Non-textile factory—Room used for printing working drawings—Factory and Workshop Act, 1901 (c. 22), ss. 10, 24 (6), 149 (4)—Electricity Regulations, 1908 (S. R. & O., 1908, No. 1312), reg. 12.

The defendants were manufacturers of electrical apparatus, and employed the infant plaintiff in a room used for the production of blue prints and working drawings used for getting out specifications and for assembling the apparatus manufactured in the factory. On Apr. 15, 1935, the infant plaintiff was injured while working a drying machine consisting of a large heated drum about 20 ins. in diameter revolving at the rate of 1 in. per second with a roller across its full width near the top and similar rollers at the top and the rear of the machine. A canvas-like material passed round these rollers, making contact with the drum about 6 ins. behind the front roller and leaving a gap of 2 ins. between the front roller and the surface of the drum. The infant plaintiff was placing a wet blue print on the drum with her right hand and holding a packet of sweets in her left hand when her hand was caught between the canvas and the drum and her hand and arm were severely burnt. She was paid workmen's compensation until Mar., 1936, when the defendants proposed to reduce the payments. In May, 1936, arbitration proceedings in respect of this reduction were threatened. In June, 1937, an action at law was first threatened, and in July, 1937, the present action was commenced, founded on (i) a breach of duty to provide proper supervision of the plaintiff, (ii) a breach of the statutory duty under the Factory and Workshop Act, 1901, s. 24 (6), in allowing a young person to be employed in a non-textile factory for more than 5 hours without an interval of half-an-hour for a meal, (iii) a breach of

the statutory duty under the Factory and Workshop Act, 1901, s. 10, in that the drying machine was dangerous and not securely fenced, and (iv) the fact that the electric motor working the drying machine was not controlled by a switch within reach of the person in charge, contrary to the Electricity Regulations, 1908, reg. 12. The defendants contended that (i) the room where the infant plaintiff was working was a factory or workshop or part of one within the meaning of the Factory and Workshop Act, 1901, s. 149 (4), (ii) the infant plaintiff had elected to take workmen's compensation, and could not, therefore, claim damages, (iii) the failure to fence was not the cause of the infant's injury, and (iv) the infant plaintiff was guilty of contributory negligence:—

HELD: (i) on the facts, there was no lack of supervision.

(ii) there was a breach of all the statutory duties above referred to, but the breach of duty was not in any of these cases the cause of the accident, and, therefore, gave the infant plaintiff no right of action.

(iii) the room where the infant plaintiff was employed was a non-textile factory within the meaning of the Factory and Workshop Act, 1901, s. 149 (4), being a room wherein manual labour was exercised by way of trade or for the purposes of gain in or incidental to the making of any article or adapting any article for sale. The blue prints and drawings were not the articles sold, but they were essential to the production of the finished article in which the factory traded.

[EDITORIAL NOTE.] There are two main issues in this case. The first is whether proof of a breach of statutory duty is by itself sufficient to give the plaintiff a remedy, or whether the plaintiff must go further, and show that such breach is the direct cause of the injury. The latter view is here taken. The second point is the more important, as being less directly covered by previous authority. It was sought to limit the definition of "non-textile factory" to those parts of a factory where the articles traded in are in fact manufactured, and to exclude from it this room where the working drawings were duplicated. The point is a fine one, and the decision is that this room was within the definition, as the provision of the working drawings was essential to the assembly or manufacture of the finished article.

AS TO NON-TEXTILE FACTORIES, see HALSBURY, *Hailsham Edn.*, Vol. 14, pp. 561, 562, para. 1073; and FOR CASES, see DIGEST, Vol. 24, pp. 900-902, Nos. 17-32.]

Cases referred to:

- (1) *Vines v. Inglis*, [1915] S.C. (J.) 18; 24 Digest 902, case b.
- (2) *Cardiff Revenue Officer v. Cardiff Assessment Committee and Western Mail, Ltd.*, *Cardiff Revenue Officer v. Cardiff Assessment Committee & David Duncan & Sons, Ltd.*, *Westminster Revenue Officer v. Daily Mirror Newspapers, Ltd.*, [1931] 1 K.B. 47; Digest Supp.; 99 L.J.K.B. 672; 143 L.T. 500.
- (3) *Hoare v. Green (Robert), Ltd.*, [1907] 2 K.B. 315; 24 Digest 903, 39; 76 L.J.K.B. 730; 96 L.T. 724.
- (4) *Nash v. Hollinshead*, [1901] 1 K.B. 700; 24 Digest 901, 29; 70 L.J.K.B. 571; 84 L.T. 483; 3 W.C.C. 125.
- (5) *Petrie v. Weir* (1900), 2 F. (Ct. of Sess.) 1041; 24 Digest 900, case o.
- (6) *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)*, [1931] A.C. 151; Digest Supp.; 100 L.J.K.B. 153; 144 L.T. 410; *H revusg.*, [1931] 1 K.B. 385.
- (7) *Brighton College v. Marriott*, [1926] A.C. 192; 28 Digest 24, 127; 134 L.T. 417.
- (8) *Curtis v. Shinner* (1906), 95 L.T. 31; 24 Digest 903, 40.
- (9) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192; 24 Digest 909, 71; 66 L.J.Q.B. 173; 76 L.T. 159.

- (10) *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.
- (11) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 24 Digest 911, 80; 67 L.J.Q.B. 862; 79 L.T. 284.
- (12) *Blenkinsop v. Ogden*, [1898] 1 Q.B. 783; 24 Digest 943, 299; 67 L.J.Q.B. 537; 78 L.T. 554.
- A (13) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; *reversd.* on other grounds, [1936] A.C. 206.
- (14) *Lewis v. Denyé*, [1939] 1 All E.R. 310; Digest Supp.; 108 L.J.K.B. 217; 160 L.T. 224.
- (15) *Dublin, Wicklow & Wexford Ry. Co. v. Slattery* (1878), 3 App. Cas. 1155; 36 Digest 74, 482; 39 L.T. 365.
- B (16) *Wakelin v. London & South Western Ry. Co.* (1886), 12 App. Cas. 41; 36 Digest 77, 507; 56 L.J.Q.B. 229; 55 L.T. 709; *affg.* (1884), [1896] 1 Q.B. 189, n.
- (17) *Sharpe v. Southern Ry. Co.*, [1925] 2 K.B. 311; Digest Supp.; 94 L.J.K.B. 913; 133 L.T. 693.
- C (18) *Murray v. Schwachman, Ltd.*, [1937] 2 All E.R. 68; Digest Supp.; 106 L.J.K.B. 354; 156 L.T. 407.
- (19) *Doswell v. Cowell* (1906), 95 L.T. 38; 24 Digest 900, 20; 8 W.C.C. 33.
- (20) *Stephens v. Dudbridge Ironworks Co.*, [1904] 2 K.B. 225; 34 Digest 492, 4070; 73 L.J.K.B. 739; 90 L.T. 838; 6 W.C.C. 48.
- (21) *Outram & Co. v. Inland Revenue*, [1930] S.C. 351; Digest Supp.

D ACTION (i) for damages for personal injury and loss sustained by the infant plaintiff, and (ii) for loss and expense incurred by the adult plaintiff, occasioned by the negligence of the defendants, their servants or agents in the management of a factory at New Southgate, or, alternatively, for damages of the like nature for breach of statutory duty by the

E defendants.

A. *Aiken Watson* for the plaintiffs.

J. *Alun Pugh* for the defendants.

Watson: The place where the infant plaintiff was working was a factory within the meaning of the Factory and Workshop Act, 1901, s. 149. The

F words "manual labour exercised by way of trade . . . incidental to . . . the making of any article" must necessarily include any operation essential to the production of an article sold. The words "or incidental to" appear never to have been adequately considered. Too much reliance has been placed on *Nash v. Hollinshead* (4). It is implicit in the

G judgments in that case, as also in the observations of SCRUTTON, L.J., in the *Potteries Electric Traction Co.* case (6), that *Nash v. Hollinshead* (4) has no general application. The real reason underlying the decision was that it was patent that the legislature never intended the Factory and Workshop Act, 1901, to apply to farming or farm processes. *Petrie v.*

H *Weir* (5) and *Doswell v. Cowell* (19) are clear authorities in the plaintiff's favour. Here the infant plaintiff was drying blue prints which were necessary to enable workers in the factory to make or assemble the articles sold. It was clearly manual labour incidental to the making of the article. The machine the infant plaintiff was working was clearly dangerous. It is admitted that it had no finger-guard and could have been fitted with

such a guard. The sole test is that contained in the Factory and Workshop Act, 1901, s. 10 (c)—namely, was this machine so fenced or securely placed as to be equally safe to persons working in the factory as it would have been if so fenced or secured? [Counsel referred to *Hindle v. Birtwistle* (9) and *Walker v. Bletchley Flettons, Ltd.* (10).] The machine was also dangerous in that the switch to operate the motor was so placed as to be in breach of the Electricity Regulations, 1908, reg. 12, in that it was not so placed as to be easily worked by persons in charge of the motor. Since the switch was so placed, the danger to which the infant plaintiff was exposed in working the machine was increased, because, in the event of an accident, she could not at once stop the machine. If once it be decided that this machine is dangerous and the place where the infant plaintiff worked is a factory, all that the infant plaintiff need show is that, while working the machine, she met with an accident which could not have taken place if the machine had been properly fenced or guarded. The fact that she cannot say how it happened is not material. The onus shifts to the defendants to establish by cross-examination or positive evidence that the infant plaintiff by her own negligence caused, or materially contributed to, the accident. No such evidence was given here. The only evidence is that this accident occurred while the infant plaintiff was working this dangerous machine. It is admitted that the infant plaintiff was holding some sweets in her hand, closed so as to make a fist. If that fact points to anything, it negatives the suggestion of contributory negligence, as a fist would be less likely to enter the nip of the machine than an open hand would. Further, there was no evidence to show that employees were forbidden to eat sweets at work. In the absence of speculation, the unshaken evidence of the infant plaintiff that the accident happened while working a dangerous machine entitled her to succeed. As to election, until the court decides liability in this case, it cannot say whether the purported election was for the infant plaintiff's benefit. However surprising the result, *Stephens v. Dudbridge Iron Works Co.* (20) and *Murray v. Schwachman, Ltd.* (18) establish this principle beyond doubt.

Pugh: This machine was not in fact dangerous, in view of the fact that it moved extremely slowly and was safe even for young girls to operate. In any event, the defendants are under no statutory obligation to the infant plaintiff, in that the place in which the machine was situate was solely used for a purpose other than the manufacturing process or handicraft carried on in the factory, and, by virtue of the Factory and Workshop Act, 1901, s. 149 (4), the place is not to be deemed to form part of the factory for the purposes of the Act. Moreover, the defendants say that the place was not a factory or workshop within the meaning of the Act. This contention is supported by *Outram & Co. v. Inland Revenue* (21) and *Cardiff Revenue Officer v. Cardiff Assessment Committee & Western Mail, Ltd.* (2). Any damage sustained by the plaintiff was caused solely, or, alternatively, was contributed to, by the negligence

- of the infant plaintiff. These are the particulars of negligence : (a) eating while working at the machine, (b) disobeying instructions as to eating whilst at work, (c) failing to keep a proper lookout, and (d) placing her hand between the canvas and the roller. The infant plaintiff has received from the defendant company weekly payments of compensation under the Workmen's Compensation Act, 1925. The defendants contend that by the provisions of sect. 29 (1) of the Act this action is barred. Moreover, the election made by the infant plaintiff was for her benefit. This case comes within the decision of *Nash v. Hollinshead* (4). The work which was carried on in this room in connection with the blue prints was not "by way of trade or for purposes of gain." It cannot be argued that the blue prints were intended for sale at all. *Vines v. Inglis* (1) is an authority which shows that the fact that premises communicate internally with a factory does not make those premises a factory. Manual labour not by way of trade or purposes of gain does not come within sect. 149. Clearly, the infant plaintiff's own conduct caused the accident. She was eating pastilles at the time of the accident and one pastille was found on the blue print when the machine was examined. It follows that a reasonable person can draw the inference that the infant plaintiff must have attempted to stop the pastille from going under the roller, and in so doing put up her left hand. This was a deliberate act. The defence of contributory negligence is a good defence to this action, i.e., breach of statutory duty : *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (13) and *Lewis v. Denyé* (14). There is no doubt that the deliberate act of the infant plaintiff was the effective cause of the accident : *Lewis v. Denyé* (14). It is significant that the plaintiff refused to answer direct questions as to the way in which the accident happened.

HILBERY, J. : The infant plaintiff in this case sues to recover damages for personal injuries sustained by her while working as an employee of the defendants, and the plaintiff, William Stimson, her father, sues to recover certain expenses incurred by him as a result of the infant plaintiff's accident and injuries. The defendants are, and were at all material times, the occupiers of very extensive factory premises at New Southgate, London, where some 5,000 to 6,000 people are employed. At this factory the defendants produced for trade and sale such things as telephone switchboards, fire alarms and radio equipment, including large transmitters and receiving sets, and the necessary equipment for broadcasting.

The infant plaintiff entered the employment of the defendants in Nov., 1934, at the age of 14 years. From the time when she entered the defendants' employment until the time of her accident, the subject of this claim, she always worked in the same room in the defendants' premises. In this room, the work done was the reproduction of copies of documents and forms by photographic processes, done by machines worked by electrical power. The documents thus produced in this room were

largely blue prints, or dialine prints, of detailed working drawings, for use in the office of the company in getting out specifications for customers, or for use by the workers in the other parts of the premises in the actual making and wiring of such articles as I have already enumerated. Nothing produced in this room was for sale by the defendants, either by itself or as part of any article made by the defendants for sale. All these machines used in the photographic reproduction processes in this room were worked by girls, and did not require the employment by any of the girls of anything which would normally be called skill. At one end of the room were two Rota printing machines worked by one man and two boys. These were in a part of the room which was divided off from the part in which the girls worked by a tall steel filing-rack, which did not reach the ceiling or the sides of the room so as to form a compartment for these machines different from the rest of the room in which the girls worked. These machines were used solely to print the printed portions of the defendants' forms for use throughout the factory and the invoices and stationery required for the defendants' business, and, on occasions, to produce the small handbooks on maintenance intended to be provided for customers, to help them to look after the articles they had bought from the defendants.

In the course of the infant plaintiff's work, she had to use both a developing machine and a drying machine. It was at the drying machine that she met her accident. This machine consisted of a drum of 20 ins. in diameter, mounted on a stand and covered with a material like canvas sheeting under tension. Near to the top of the front of this big drum, and across its full width, was a roller round which, from other rollers situated respectively on top of and behind the drum, there came a sheet of a similar canvas-like material which passed round this roller and back towards the top and rear of the drum, making contact with the surface of the drum about 6 ins. behind this front roller. The space between the front roller and the surface of the drum was 2 ins. When the machine was running, the big drum was heated from inside by electrical elements, controlled from switches fixed on the righthand side of the drum-mounting on the stand, and the drum revolved very slowly, moving at the rate of only 1 in. per second.

The infant plaintiff's ordinary hours of work in the afternoon were from 2 p.m. to 5.30 p.m. On the occasion in question, she was, however, working overtime, and had been given a 10-minutes' break for tea and 10 minutes in which to go from the room to wash. On Apr. 15, 1935, at about 6.5 p.m., the infant plaintiff met with her accident at the drying machine. The drying machine was used in the following way when it was in motion. A girl wishing to dry a wet blue print would hold it between the finger and thumb of each of her hands by each of the two top corners of the print and apply the full width of the top of the print to the surface of the rotating drum just above the middle line of the drum. The wet paper would cling to the material covering the drum,

and as the drum slowly rotated upward it would gradually roll on to its surface the rest of the wet blue print then hanging down from it, the girl meanwhile keeping the print spread by letting either side of it run through her fingers. The print thus carried on the drum passed under the front roller to the point 6 ins. behind that roller where the canvas from that roller met and pressed upon the surface of the drum. It was then pressed between the upper canvas and the heated canvas covering of the drum, and was thus dried.

Immediately before her accident, the infant plaintiff had put upon the drum of the machine a large wet blue print. At the time, she was holding in her left hand the remains of a small packet of sweets called wine gums. Her left hand got between the upper canvas from the roller and the surface of the hot drum, and was held in that position. Whilst her hand was so held, the plaintiff could not reach the switch for stopping the machine, and her thumb and arm were burnt. Her scream brought another girl to the machine, who turned off the power and released the infant plaintiff. The infant plaintiff had no right to be eating in this room during working hours and while at her work. As a result of the accident, the thumb of her left hand was seriously burnt, and is now to some extent deformed, and there was also a large area of severe burning which has left a serious scar on the underside of the left forearm. She was treated by her own doctor from Apr. 15 onwards. In addition to the thumb and the forearm, the palm of the hand was burnt, and some of the burning which she sustained actually destroyed tissue and exposed tendons. By the end of Mar., 1936, she was fit for light work. She was offered light work by the defendants, but this was refused because her father had removed his home and it was inconvenient for the infant plaintiff to work at the defendants' premises.

The infant plaintiff's father is a clerk in the office of the solicitors who act for his daughter in this matter. In Apr., 1935, he consulted them about the plaintiff's situation as a result of the accident, and both he and the solicitors then thought that the proper thing for the infant plaintiff to do in her own interest was for her to take her workmen's compensation payments. In these circumstances, the infant plaintiff was paid, and received, her proper payments under the Workmen's Compensation Act until Mar., 1936. On Mar. 9, 1936, a notice of a proposal to review the payments was served upon her. On Mar. 13, 1936, the infant plaintiff was offered light work at the defendants' premises, and this was refused. On Mar. 28, the infant plaintiff's present solicitors wrote a letter of protest against the proposed reduction, and in May, 1936, they threatened arbitration proceedings under the Workmen's Compensation Act to test the propriety of the proposed reduction. The infant plaintiff took a course of training in shorthand and typewriting, but was unable to manage the typewriting. She did, however, obtain employment of a clerical nature in Oct., 1936, and has continued in different employments in clerical types of work ever since, in which employments she has earned,

it was admitted, as much as she would have earned throughout the same period had she remained in the defendants' employment uninjured and receiving regular periodical increases of wages. In June, 1937, for the first time, an action at law was threatened against the defendants, and on July 6, 1937, the writ in this action was issued.

The plaintiffs' claim in this action is based upon allegations which fall into two categories. In the first place, the plaintiffs allege that the defendants were guilty of a breach of their duty to provide proper supervision of the infant plaintiff while she was working, and of a failure to take reasonable care of the infant plaintiff, because, it is alleged, the defendants allowed her to eat while at her work. In the second place, the plaintiffs base their claim on alleged breaches of statutory duties under the Factory and Workshop Act, 1901—that is to say, (a) on a breach of the provision in sect. 24 (6), that a woman or young person in a non-textile factory, and a young person in a workshop, should not be employed continuously for more than $4\frac{1}{2}$ hours without an interval of at least half-an-hour for a meal, (b) that a woman, young person or child should not during any part of the times allowed for meals in the factory or workshop be employed in the factory or workshop, or be allowed to remain in a room in which a manufacturing process or handicraft was then being carried on, (c) that contrary to sect. 10, the machine at which the infant plaintiff was working was dangerous and not securely fenced, or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced, and (d) that, contrary to the Electricity Regulations, 1908, reg. 12, under the same Act, the electrical motor which drove the machine in question was not controlled by an efficient switch for starting and stopping, so placed as to be easily worked by the person in charge of the motor. The defendants denied the alleged breaches of duty on their part, and alleged substantively that the place in which was situated the machine at which the infant plaintiff met her accident was not a factory or workshop, and did not form part of a factory within the meaning of the Factory and Workshop Act, 1901, s. 149 (4), and that, even if it did, the infant plaintiff had received weekly payments of compensation under the Workmen's Compensation Act, 1925, until Mar. 19, 1936, and the defendants were, therefore, by virtue of the provisions of sect. 29 (1) of that Act, not liable in damages. Further, they alleged that the alleged failure to fence the machine was not the cause of the infant plaintiff's injury, and that the infant plaintiff was guilty of contributory negligence.

With regard to the allegation of lack of supervision in allowing the infant plaintiff to eat while at work, and in allowing her, during a part of the time allowed for meals, to be employed, or to be allowed to remain, in a room where a manufacturing process was then being carried on, I need only say that, having seen and heard the infant plaintiff and her witnesses, and the witnesses called for the defendant, I accept the

evidence of the defendants' witnesses unhesitatingly, and find as a fact that there was no lack of proper supervision. There was in truth a competent supervisor on duty at the time, who was, I am satisfied, not only capable, but also experienced, in her duties. The defendants' witnesses satisfied me as well that the infant plaintiff was not permitted
A to eat, that the accident did not happen to her during any time allowed for meals, and that the room in question at the time of the infant plaintiff's accident was not being used for any meal.

With regard to the allegation that the infant plaintiff was being employed continuously for more than 4½ hours without an interval of half-
B an-hour for a meal, while it is true to say that, if she had completed her overtime on the day in question, she would have been employed continuously for more than 4½ hours without a break of a complete half-hour for a meal, none the less her continuous employment without such a break was not shown to have anything to do with the accident which
C occurred to her, and was not shown to be relevant. Nor, in my view, on the facts, did the alleged breach of the Electricity Regulations, 1908, reg. 12, turn out to have any relevance, so far as the infant plaintiff's claim was concerned. In fact, the switch for starting and stopping the machine was out of reach of a person working the machine for the purpose
D of doing with the machine that which the machine was intended to do. As, on the evidence, the person who actually used this machine was, for the time being, the person in charge of the motor which drove the machine, and the switch was out of reach of such a person, there was, in my view, a breach of this regulation. When using the machine, the person using
E it stood in front of it, and the switch for starting and stopping it was then, for such a person, on the righthand side of the machine, but at the back of the machine, and out of reach of the person so using it. It was said for the infant plaintiff that, if the switch had been placed within reach of a person using the machine in the ordinary way, the infant plaintiff,
F when her left hand was caught, in the way in which she complains that it was caught, could have switched off the motor and extricated her hand before being burned as severely as she was. I am not satisfied on the evidence that, even if the switch had been accessible to her, the machine would have been switched off sooner than it actually was. She did
G not satisfy me that she was held for any length of time. She left on my mind the impression that her scream at once brought to her rescue someone who switched off the machine, and, on the evidence, I am quite unable to say that the infant plaintiff suffered any greater degree of injury through the inaccessibility of the switch than she would have suffered
H if the switch had been within her reach.

Having dealt with those matters, I can turn to what really constituted the *gravamen* of the infant plaintiff's case—that is to say, to the alleged breach of the defendants' statutory duties under the Factory and Workshop Act, 1901, s. 10. For the purposes of this alleged cause of action, the first thing which the infant plaintiff must establish is that the room

where she was at work at the time of her accident was a non-textile factory within the definition given in that Act. In support of the contention that it was, stress was laid by her counsel on the fact that it was a room in the building which was undeniably the defendants' factory for the production of the articles in which the defendants traded, and that one door gave access to the factory while another gave access to a corridor leading to that factory. That the physical situation of the room in question under the same roof as that which was admittedly a factory within the Act, and the communication of that room with the parts of the defendants' premises which were admittedly factory premises within the Act, is not enough to fix the room with the character of a factory within the definition given in the Act is settled, it seems to me, by such decisions as *Vines v. Inglis* (1) and *Cardiff Revenue Officer v. Cardiff Assessment Committee & Western Mail, Ltd.* (2). A B

For the defendants, it was urged, on the other hand, that this room was a place within the factory solely used for a purpose other than the process of manufacturing or handicraft carried on in the factory, and that it must therefore be shown by the infant plaintiff to come within the definition of a non-textile factory under the Act. I have indicated the purposes for which the room was used. One of such purposes was the reproduction in the ways I have indicated of photographic prints of plans for the use of the workmen making and wiring the articles produced in the other parts of the factory for sale to customers, and, as the room must, in my view, be taken to include that part which was incompletely separated from it by the partition behind which the Rota printers stood, another purpose was the production of the little booklets on the after-care and maintenance of the articles produced in the factory. C D E

It is necessary, in these circumstances, to turn to the definition section, and any decisions there may be upon it, to see whether this room was a factory or part of a non-textile factory within the definition given in the Act. There is no doubt that mechanical power was used in the room, and was used as part of the process of manufacturing the blue prints and the booklets. The difficult problem which arises is upon the next part of the definition, and it is whether or not this room was a room within the following definition : F

... wherein or within ... which any manual labour is exercised by way of trade or for purposes of gain in or incidental to (i) the making of any article or of part of any article; or ... (iii) the adapting for sale of any article. G

That what the girls did in the room in conjunction with the machines in the production of the blue prints was manual labour seems to me to be open to little doubt. The girls' duties at the machines required the minimum amount of skill. Nor, as was pointed out in *Hoare v. Robert Green, Ltd.* (3), does the lightness of the work which they had to do prevent its being manual labour within the meaning of the Factory and Workshop Act. The real difficulty on this part of the case is to decide whether or not the other words in the definition are satisfied by what H

was being done in this room, and whether or not the manual labour exercised by the infant plaintiff and the other girls in the room was :

... manual labour ... exercised by way of trade or for purposes of gain in or incidental to ... (i) the making of any article or part of any article ; or ... (iii) the adapting for sale of any article.

- A In *Nash v. Hollinshead* (4), a workman was employed by a farmer on his farm to drive a movable steam engine for the purpose of working a mill for grinding meal intended to be used for food for stock on the farm, and not for sale. In considering whether the workman was employed in a non-textile factory within the meaning of the Factory and Workshop Act then in force, which contained the very same definition as that which I have quoted, SIR A. L. SMITH, M.R., said, at pp. 704, 705 :

In my opinion the whole definition is governed by the words "by way of trade or for purposes of gain," and I think that in this case those words are not satisfied, because the county court judge finds that the meal was not intended for purposes of sale but of feeding the stock on the farm. The meal was therefore clearly not ground by way of trade within the meaning of the Act. It was argued that, though the words "by way of trade" might not be applicable, the words "for purposes of gain" applied to this case ; because, the meal being made more suitable food for stock by the process of grinding, the profit of the farmer on his stock was thereby enhanced. I think that the "gain" intended by the section is a direct gain, and that the legislature, in using the words "for purposes of gain," contemplated the manufacturing of some article for the purpose of direct gain, and not of such an indirect gain as that suggested, namely, the possible fattening of a bullock.

- D That passage was greatly relied on by the defendants as meaning that the manual labour in question must be shown to have been exercised directly for gain, and it was said that, as these blue prints and booklets were not themselves for sale, the manual labour of these girls which went to their production was not exercised by way of trade or for direct gain.
- E On a careful consideration of those words of SIR A. L. SMITH, M.R., I do not think that they support that contention. I think that SIR A. L. SMITH, M.R., was merely stressing the fact that the grinding of the meal was not being done as one of the processes in manufacturing an article for sale. In the passage I have just quoted, his emphasis is on the fact that, in using the words "for the purposes of gain," the legislature contemplated the manufacturing of some article for the purpose of direct gain. His language indicates that, if the manual labour had been in or incidental to the manufacture of an article for sale, his decision might have been different.
- G The manufacturing of some particular article may involve the use of manual labour in a number of processes, each one of which is to produce something complete in itself, but intended, not for sale, but to be used as a component of, or as incidental to, some larger and different article which is the product of the particular factory. For example, in many factories there is a part where jigs are made, not for sale, but for use in the production of component parts of the articles made and sold by the business owning and running the factory. Here the blue prints were in some cases for the use of the workmen in the factory in making and assembling the articles—such as switchboards and telephone apparatus—which were the output of the
- H

factory proper, and were made for trade and gain. Where blue prints were produced for this purpose, they were as essential to the manufacture and the assembling of these articles as were the parts which were put together by the workmen, since they contained the directions upon which alone the workmen could so assemble the various parts that, when they were assembled in accordance with the plan, there would result the completed article in which the factory traded. A

I am aware that I am reading the definition as though the words "by way of trade or gain" do not merely govern the words "manual labour is exercised," but rather as though those words governed the whole of the definition. It seems to me, however, that the definition requires this construction, for it speaks of any premises in which manual labour is exercised in or incidental to the making of any article or the adapting for sale of any article. The words "or incidental" indicate an intention to include manual labour other than that employed directly in making the article in which the factory trades. B

This view seems to me to be consonant with the view taken in *Petrie v. Weir* (5). Moreover, *Nash v. Hollinshead* (4) was not only decided on the reasoning of SIR A. L. SMITH, M.R., which I have quoted. COLLINS, L.J., decided it upon the general ambit of the Act and the intention of the Act to be derived from an examination of the several sections, and decided that it was a case in which the Act was obviously not intended to apply. ROMER, L.J., did not give his express concurrence to these words of SIR A. L. SMITH, M.R., which I have quoted. All that ROMER, L.J., said, after COLLINS, L.J., had given his judgment, was, at p. 707 : C

I agree. I have nothing to add, except to say that I express no opinion as to what the result might have been, if the operation of grinding the meal, as carried on in this case, had been carried on with a view to the sale of the meal as an article of commerce. D

In his judgment in *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)* (6) and the other cases then decided, SCRUTTON, L.J., speaking of *Nash v. Hollinshead* (4), said, at p. 492 : E

If there is a trade there is no need to consider "gain." The words "profits or gains of trade" have been used together in various connections for many years. In dealing with the Income Tax Acts LORD CAVE, L.C. in *Brighton College v. Marriott* (7) treated the surplus receipts of a corporation carrying on a trade for the benefit of a charity, if they were not "profits," at least as "gains." The Divisional Court in *Curtis v. Shinner* (8), where a fishing-boat owner employed for reward labour to mend his nets, declined to hold the place of working a workshop, following *Nash v. Hollinshead* (4), on the ground that to repair nets for use in his own business was not "repairing for purposes of trade or gain." While *Nash v. Hollinshead* (4) may be justified as applicable to farming I see no reason to extend it to cases where labour is used in the manufacture of goods to enable a trade to be carried on which does not involve the sale of goods. I think *Curtis v. Shinner* (8) was wrongly decided. It appears to me that a factory making printing machines would none the less be carried on for the purpose of trade because the machines were not made for the purpose of themselves being sold but only to make things to be sold. F

Those words seem to me to point strictly to that interpretation of the definition section which I have given to it. I think, therefore, that the G

room where the infant plaintiff was employed was a non-textile factory within the definition.

The next matter which was in issue and falls to be decided is whether or not the machine in question was a dangerous machine. The test which I have to apply is to be found in the judgment of WILLS, J., in *Hindle v.*

A *Birtwistle* (9), at pp. 195, 196 :

It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. . . . In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration.

B I add to that the expansion of those words which was made by DU PARCQ, J., in *Walker v. Bletchley Flettons, Ltd.* (10), at p. 175 :

That a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur.

C Applying those passages to the present case, I have to remember that the human being working this machine was, on the occasion in question, a girl in her fifteenth year (and, on the evidence, it is clear that the machine was ordinarily worked by a girl of about this age), and the contingency of carelessness such as a girl of that age might be likely to

D exhibit has to be taken into account. The evidence shows that normally the top of the wet print would be put on the drum at a point about 6 ins. or 7 ins. below the top roller, and, if so placed, an interval of about 10 seconds would elapse before a hand holding the print, or upon the top of it, would be caught in the nip between the upper canvas and the

E drum. However, there was nothing to prevent the girl working the machine from applying the top of the print to the drum close up to the roller, if, for example, she wished the print to pass through the machine a little more quickly than it would do if she applied the print to the drum at the normal position. If she put the print on the drum close to

F the roller, and then tried to smooth it with her fingers, to force the top of the print to adhere to the drum surface across its full width, she would have put her fingers under the roller to do the smoothing, and, if she put them too far under the roller, she might get them caught in the nip.

G True, there is a distance of 6 ins. between the roller and the point of contact between the revolving drum and the upper canvas, but a girl doing such a thing as I have indicated, with no more carelessness than one might anticipate on the part of a girl of 14 or 15 years of age, might well place her finger in contact with the upper canvas and the roller so

H as to get it nipped and held. She would not have to put her finger the whole distance of 6 ins., because the canvas coming from round the upper roller to meet the surface of the drum forms an angle, and the finger might conceivably be pressed before it arrived at the actual point of contact between the canvas and the surface of the drum.

There is no evidence that that was how this accident happened, but that an accident might have happened in such a way convinces me that,

applying the tests which, on the authorities I have just quoted, I think I am bound to apply, the machine must be classified as dangerous. It must be held dangerous because, in the ordinary course of human affairs, danger of such an event happening as I have described might reasonably be expected from the use of the machine unless such protection was afforded as would prevent such a thing from happening. When I was at the defendants' premises, a girl was called upon to put a wet print through the machine, and I observed that she held the wet print at its upper end by each of the top corners and applied it to the drum, and then did actually smooth across its top as it slowly moved upwards, and that it was after doing this that she lightly held the sides of the print to keep it spread evenly, and then let it slip through her fingers as it moved upwards and round the drum. I am satisfied from the evidence of Mr. Raphael that the machine could have been provided with a finger-guard which would have eliminated the possibility of a girl who was working it getting her fingers up between the roller and the drum. There was, therefore, a breach by the defendants of their statutory duty to fence this machine.

In most of these cases, that would conclude the matter, but it does not exhaust the supply of difficulties which this case affords. The evidence in this case leaves me with the question whether there lies upon the female plaintiff the onus of proving that her accident and injury were caused by the breach of statutory duty of which she complains, or whether it is enough if she proves a breach of statutory duty, and an accident, and injury which, but for the existence of that breach of duty, could not have occurred. She professes to be completely unable to say how her hand got between the top roller and the drum and into the nip between the cloth running back from the roller and the surface of the drum. I tried to induce her to tell me just what she was doing when her hand got caught, and she remained mute. I observed her very carefully while she was being questioned by counsel and by me, and I became convinced that she could say how it happened if she would. Her hand and arm were not held for a long time. Her cry for help was answered, and the machine was at once stopped. She never lost consciousness. She did not faint. Her injuries consisted of a serious burning of the thumb, and a lesser degree, though still a serious degree, of burning of the surface of the forearm and the palm of the hand. This matter, then, stands thus. The infant plaintiff's hand somehow became held between the canvas running from round the roller and the surface of the slowly rotating drum, and she suffered her injuries because her hand was thus held. So far as the infant plaintiff's evidence goes, she might have put her hand there deliberately. Reliance cannot be placed upon her denial that she did do this. According to her own evidence, she could not thoughtlessly have let the hand rest on the drum and travel slowly up to the position under the roller in which it must have got when it was caught. The drum was very hot, and she would instinctively

have drawn her hand away long before it got near the roller. Her evidence was as follows :

I don't know how I did it. It just went under. I did not keep my hand on the roller as it went round. I don't remember how it happened at all. I think eating pastilles might have had something to do with the accident.

A If it is enough for the plaintiff to show that her hand was caught in the machine, was injured through being so caught, and could not have been so caught if the machine had been securely fenced in accordance with the requirements of the statute, then, on this evidence, she has established a cause of action. That, however, is only tantamount to saying : “ If there had not been the breach of the statutory duty which B I have established, I could not have suffered the injury of which I complain.” Thus stated, the breach of the statutory duty established is not shown to be any more than a *causa sine qua non*. If the burden on the plaintiff in such a case is to give evidence at least *prima facie* establishing C that the breach of statutory duty of which complaint is made was the cause, or, as some judges have preferred to call it, the *causa causans*, of the plaintiff's injury and damage, then the infant plaintiff, whose evidence goes no further than I have just stated, must fail. I pause to say D that of course she does not necessarily fail because of inability to give direct evidence. As in every other case, it is sufficient if the infant plaintiff proves such matters of fact as lead to the inference that the breach of duty of which she complains was the cause of her injury.

There is, I think, no authority directly deciding this point, but there are *dicta* and decisions which seem to indicate the views hitherto held by E judges. In *Groves v. Wimborne* (Lord) (11), at p. 411, VAUGHAN WILLIAMS, L.J., says that this particular cause of action for breach of this statutory duty will lie at the suit of a person who “ is injured by failure to perform it.” RIGBY, L.J., in the same case, expresses it thus, at p. 412 :

F Whether there be negligence or not, he [the person on whom the statutory duty rests] is responsible *quacunqve via* for non-performance of the duty.

At the end of his judgment in the same case, VAUGHAN WILLIAMS, L.J., says, at p. 419 :

No one would contend, if there were contributory negligence, that such negligence on the part of the plaintiff would not be an answer to a claim by him for damages in respect of an injury occasioned through the neglect of his master to perform the absolute statutory duty. It would be an answer for the reason that in fact the G damage to the plaintiff would not be caused by the failure of the master to perform the absolute statutory duty, because it would not have happened but for that and something else, namely, the contributory negligence of the plaintiff.

There VAUGHAN WILLIAMS, L.J., clearly intends to convey that a plaintiff seeking damages on account of the defendant's breach of an absolute H statutory duty must show that that breach was the cause of his injuries. That, too, I think was clearly the view of KENNEDY, J., for in *Blenkinsop v. Ogden* (12), dealing with the Factory and Workshop Act, 1878, s. 82, he said, at p. 785 :

It being admitted that, but for the neglect to provide proper fencing, the injury would not have been suffered, I think it would be clearly wrong, looking at the

object of the section, to construe the words "in consequence of" as if we were dealing with an action by the injured person for damages. In that case his own contributory negligence would be an answer, upon the ground that the immediate and direct cause of the mischief would be his own conduct, and not the occupiers' neglect to fence.

The defence of contributory negligence in such an action as that which I am considering still affords an answer in law to the claim : see *Flower v. Ebbw Vale Steel Iron & Coal Co., Ltd.* (13) and the still more recent decision in the Court of Appeal in *Lewis v. Denyé* (14). It should be observed that in actions on the case for breach of duty this defence of contributory negligence has always been a defence, because, when established, it broke the chain of causation. In such actions on the case, the burden of proving that the defendant was guilty of the breach of legal duty owed to the plaintiff on the occasion in question, and that that breach of duty caused the plaintiff the damage which the plaintiff claimed to recover, rested on the plaintiff. For this reason, where the claim was for damage caused by negligence, the plea of Not Guilty raised the defence of contributory negligence. That plea put in issue whether or not the alleged breach of duty of the defendant was the cause of the plaintiff's damage. If, therefore, as *Flower's* case (13) and *Lewis v. Denyé* (14) seem to show, the defence of contributory negligence is a defence to an action on the case for breach of a statutory duty, it must be because it breaks the chain of causation and leaves the plaintiff's case unproved.

The result is, it appears to me, that the infant plaintiff must prove that the cause of her injury was the defendants' breach of the absolute statutory duty upon which reliance was placed. If she fails to do that, she fails in her action. I am not overlooking the fact that it has been held that the defendant has the burden of proof upon him of establishing an allegation of contributory negligence. That is not the same thing as saying that he must call evidence. The plaintiff's case may establish it for the defendant. As was said by LORD HATHERLEY in *Dublin, Wicklow & Wexford Ry. Co. v. Slattery* (15), at p. 1169 :

... if such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide . . .

If that is the legal situation, then it must be because, once contributory negligence is proved, the chain of causation relied on by the plaintiff is broken. I do not doubt that the words I have just quoted represent the law, since they are approved by LORD WATSON in *Wakelin v. London & South Western Ry. Co.* (16), at p. 48, and cited with approval by SCRUTTON, L.J., in *Sharpe v. Southern Ry. Co.* (17), at p. 317.

I think that the infant plaintiff in this case has not discharged the burden upon her. When I say that, I am, of course, saying so after considering, not merely direct evidence, but also whether there is sufficient material to establish her case inferentially. I accept the evidence given by the defendants' witnesses, and by it I am satisfied that on the print which the infant plaintiff was drying at the time of her accident there was

found a sweet exactly similar to those which she had in the packet which she was holding in her left hand—that is, in the hand which was injured. I am satisfied that the plaintiff knew that eating during working time was not allowed, and I do not accept the evidence of the witnesses whom she called in an effort to establish the contrary. That sweet which
A was on the print may, of course, have come from the packet after her hand was caught. On the other hand, it may have been observed by the infant plaintiff to have got upon the print as it passed under the roller, or just after it had passed under the roller, and she may have put her left hand—holding the packet, and therefore partly closed, so as to
B form a fist—under the roller in an effort to retrieve the sweet from the print, and thus caused her hand to get caught.

As I have said, I am satisfied that the infant plaintiff does know, and could say, how her hand came to be caught, and, when it is borne in mind that, not only would she not tell the court, but also she professed
C an inability to tell the doctor who examined her shortly after the occurrence, I am left with the impression that she refuses to say how it happened because she believes that, if she did give the information, it would show that she was doing something foolish, or irregular, or something which left only herself responsible for her mishap. When I add to this the fact
D that the drum revolved so slowly that no one's hand could be drawn under the roller by it, the fact that the infant plaintiff says that she could not carelessly have rested her hand on the drum or left it there to be carried under the roller, the fact that there is no suggestion that she stumbled or slipped, and put her hand out to save herself from falling,
E the fact that she was conscious and acting of her own volition all the time, the fact that the hand in question was incommoded by holding the packet of sweets, and the fact that she says, "I think eating pastilles might have had something to do with the accident," there is far more evidence to justify the inference that she caused the accident by an
F intentional act of her own which must have been lacking in reasonable care for her own safety than there is to justify the inference that her accident was caused through the machine not being securely fenced. In these circumstances, the plaintiffs have failed to satisfy me that the cause of the infant plaintiff's mishap was the failure of the defendants
G to fence, or put a finger-guard on, the machine in question. On the other hand, I do not think that there is sufficient evidence to enable me to say definitely whether or not there was contributory negligence.

In the view which I have taken, it is not necessary for me to decide whether or not the defence that an election had been made by or on
H behalf of the infant plaintiff, through her advisers, to accept workmen's compensation payments, and not to exercise her common law remedy, was binding upon her. If it had been necessary to decide it, however, bearing in mind that the question whether or not the election was for the infant's benefit must be considered as it existed at the time when the election was made, if I am bound to apply the considerations

which the Court of Appeal thought appropriate for consideration in *Murray v. Schwachman, Ltd.* (18), I do not think that the election here, at the time it was made, was for the infant's benefit. As I saw the infant, and myself examined her damaged thumb and scarred arm, and heard the medical evidence, it may be that a finding upon damages by me will be of assistance to any higher court to which this case may go, and I will therefore only add that, if I had found in the infant plaintiff's favour, I should have awarded her £750 and her father £17. A

Judgment for the defendants with costs.

Solicitors: *Royds, Rawstorne & Co.* (for the plaintiffs); *Carpenters* (for the defendants). B

[Reported by CHARLES NEWTON, ESQ., Barrister-at-Law.]

Re JOHNSON, PUBLIC TRUSTEE v. CALVERT.

[CHANCERY DIVISION (Crossman, J.), March 29, 1939.] C

Trusts—Precatory trust—Request—Request to leave property to certain persons—Home-made will.

Wills—Construction—Absolute gift with request to leave property to certain persons—Precatory trust.

The testator's will provided that his estate should be equally divided between one C. and the testator's mother. There followed a provision in the following terms: "I request that my mother will on her death leave the property . . . to my 4 sisters." Another clause provided as follows: "I request that C. will on her death leave her property to my 4 sisters. Should C. die before me, the whole of my property shall be given to my mother." The testator's mother having predeceased the testator, and the latter having died without issue, two questions arose: D
 (i) whether the first moiety of the testator's residuary estate was undisposed of by will or was to go to the surviving sisters of the testator, and (ii) whether the other moiety belonged to C. absolutely or was to be held upon trust for C. for life, with remainder to the testator's surviving sisters:—

HELD: as the words contained in the will did not impose an imperative obligation, there was no trust, and the gifts were absolute gifts, with the result that the first moiety went as on an intestacy, and the second moiety went to C. absolutely. F

[EDITORIAL NOTE.] In home-made wills, it is common to find a provision purporting to make a further disposition of property given to a person absolutely. Such a gift usually takes the form of a gift of what remains of the property at the death of that person. In the will here considered, the further gift takes the form of a precatory trust, and it is probable that the fact that the provision is in this form renders the construction of the will a much simpler matter, since the only question which can arise is whether there is something imperative in the will directing that the property shall be held upon certain trusts. G

AS TO PRECATORY TRUSTS, see HALSBURY, 1st Edn., Vol. 28, Trusts, pp. 12-16, paras. 17-22; and FOR CASES, see DIGEST, Vol. 43, pp. 578-591, Nos. 274-402.] H

ADJOURNED SUMMONS to determine questions arising upon the true construction of testator's will. The facts and arguments are fully set out in the judgment.

E. J. Heckscher for the plaintiff.

Alexander Grant, K.C., and Wilfrid M. Hunt for the first defendant.

J. Neville Gray, K.C., and G. R. Upjohn for the second, third, and fourth defendants.

H. B. Vaisey, K.C., and H. O. Danckwerts for the last five defendants.

A CROSSMAN, J. : The testator, Charles Percy Johnson, made his will on Aug. 12, 1906, as follows :

This is the last will of Charles Percy Johnson. Everything that belongs to me shall be equally divided between Mary Elizabeth Calvert [described] and my mother Marie Victorine Johnson.

B I request that my mother will on her death leave the property, or what remains of it, that she obtains under this will to my 4 sisters.

I request that Mary Elizabeth Calvert will on her death leave her property to my 4 sisters. Should Mary Elizabeth Calvert die before me, the whole of my property shall be given to my mother. I advise that my business of C. P. Johnson, 29 Mincing Lane, be liquidated at my death.

C The testator's mother, Marie Victorine Johnson, died on Feb. 24, 1929, and the testator lived until July 1, 1938, and he died without issue. On Jan. 27, 1939, administration with the will annexed was granted to the Public Trustee. The estate was a very large one. The two questions which now arise, and which the Public Trustee has brought before the court, are expressed in the originating summons as follows :

D 1. Whether according to the true construction of the will of the above-named testator Charles Percy Johnson and in the event which has happened of his mother Marie Victorine Johnson having predeceased the testator one moiety of the testator's residuary estate is undisposed of by the said will or belongs to the defendants the 3 surviving sisters of the testator as joint tenants, or how otherwise.

E I should have mentioned that the testator had 4 sisters only, and one of them died in September, 1918. The gift, so far as it is a gift, is clearly a gift to the 4 sisters as joint tenants. It is the 3 surviving sisters who are entitled, if anybody is entitled, to claim under this gift, and those 3 sisters are 3 of the defendants to the present originating summons. The second question is as follows :

F Whether the other moiety of the testator's residuary estate belongs absolutely to the defendant Mary Elizabeth Calvert or whether the said moiety is held upon trust for the said defendant for life with remainder to [the 3 sisters] or how otherwise.

G It was argued on the first questions that, according to the true construction of the will, and in the events which have happened, the one moiety of the testator's residuary estate which is given to the testator's mother Marie Victorine Johnson is undisposed of and goes to the testator's statutory next of kin.

H On the second question, it was argued, on behalf of Mary Elizabeth Calvert, that she took under the gift absolutely—that is, subject to no trust or condition—and that the sisters took no legal or equitable interest in this moiety of the estate. In my opinion, the question turns entirely upon the language which the testator has used in this particular will, because I think that the principles of construction of wills on this point—and, in fact, on the questions generally with regard to

what are known as precatory trusts—are so well established that it is not for me now to go into that question at all. The question, as is pointed out in the most recent cases, is entirely a question of the construction of each document, and the main question, I think, is whether there is something imperative in the will, something which requires that something shall be done. When it is said that a fund of a certain amount is to go in a particular way, a certain amount of emphasis has to be placed on the word “is,” whether or not it is to go imperatively. One has to look at the whole document to see whether or not it is imperative. One has to look here to see if something is imperatively imposed upon these two people—Mary Elizabeth Calvert and Marie Victorine Johnson—which prevents them from taking absolutely and free from any limitation or condition. What obligation is imposed upon them? Looking at the will as a whole, and the parts I have to consider, beginning with the request, I find, first of all, a request in these words :

I request that my mother will on her death leave the property, or what remains of it, that she obtains under this will to my 4 sisters.

I request that Mary Elizabeth Calvert will on her death leave her property to my 4 sisters.

Those two sentences, to my mind, are full of difficulty when one comes to consider exactly what was in the testator’s mind. However, when I look at the different items, if I may so describe the words, the fact that the word used is “request,” the fact that, in the first case, what the mother or Mrs. Calvert has to leave is the property, or what remains of it, and the fact that, in the second case, what she has to do is to leave her property, which, on a natural construction, would mean the whole of her property, whether or not it came from the testator’s 4 sisters when I take all those points into consideration, I am forced to the conclusion that this testator did not mean to impose any imperative obligation on either of the two persons between whom he is dividing his estate. I come to the conclusion that he was expressing a wish, not intending a trust, but he trusted and hoped that they would give effect to this wish, and he gave the property to them absolutely. I arrive at the conclusion that this is an absolute gift to these two people in equal shares, and, as one died in the testator’s lifetime, there must be an intestacy as to that share. Therefore, one moiety goes as on an intestacy, and the other moiety goes to the original donee, who survived the testator, and takes absolutely. The two questions must, in my judgment, be answered accordingly.

One moiety to go as on intestacy, and other to C. absolutely. Costs as between solicitor and client payable out of estate.

Solicitors : *Evelyn Jones & Co.* (for the plaintiff and for the first defendant) ; *Maples, Teesdale & Co.* (for the second, third, and fourth defendants) ; *Lawrence, Graham & Co.* (for the last five defendants).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

ANTOFAGASTA (CHILI) AND BOLIVIA RAILWAY CO.,
LTD. v. SCHRODER, TIARKS AND WATERHOUSE.

[CHANCERY DIVISION (Morton, J.), April 20, 21, 1939.]

Companies—Debentures—Re-issue after redemption—Whether alteration in date of redemption possible—Companies Act, 1929 (c. 23), s. 75.

A

The plaintiff company issued 4 series of debentures, the first redeemable only on the winding up of the company, the second and third on Jan. 1, 1940, and the fourth on July 1, 1960. The company asked by summons whether it had power to redeem the second and third series and re-issue them with a different date for redemption :—

B

HELD : upon the proper construction of the Companies Act, 1929, s. 75, the debentures could only be re-issued with the same provisions as to redemption as those in the original debentures.

[EDITORIAL NOTE. The only question here is the construction of the Companies Act, 1929, s. 75, providing for the re-issue of debentures. Upon the re-issue of debentures, the new debenture holder obtains the same priorities as if the debenture had never been redeemed, and it would have been of considerable benefit to companies if the date of redemption could, on the re-issue, have been altered to a later date.

C

AS TO RE-ISSUE OF DEBENTURES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 490, 491, para. 790 ; and FOR CASES, see DIGEST, Vol. 10, pp. 766-768, Nos. 4797-4802.]

D

ADJOURNED SUMMONS asking whether, upon a re-issue of debentures, the company might insert in the debenture a different date for redemption. The facts are fully set out in the judgment.

H. Wynn Parry, K.C., and W. Gordon Brown for the plaintiffs.

E

A. Andrewes Uthwatt for the defendants, the trustees of the fourth debenture stock.

F

MORTON, J. : The plaintiff company in this case, the Antofagasta (Chili) and Bolivia Railway Co., Ltd., has issued the following four series of debenture stock, all of which are now outstanding. First, the company has issued £1,000,000 4 per cent. debenture stock, repayable at par only in the event of a winding up of the company. That stock is not material to the decision of the present case. I shall refer to it for convenience as the first stock. Secondly, the company has issued £1,000,000 4½ per cent. debenture stock, maturing for redemption at a premium of 5 per cent. on Jan. 1, 1940. That I shall refer to as the second stock. Thirdly, the company has issued £1,500,000 5 per cent. debenture stock, maturing for redemption at a premium of 10 per cent. on Jan. 1, 1940. That I shall call the third stock. Fourthly, the company has issued £1,408,950 5 per cent. debenture stock, maturing for redemption at a premium of 10 per cent. on July 1, 1960. That has been referred to in the affidavit sworn in these proceedings, and I shall refer to it as the Bolivia stock.

G

H

The Bolivia stock, by a trust deed of Aug. 16, 1910, was constituted a first specific charge upon certain mortgage bonds. Clause 9 of the trust

deed, which is the only clause which has been referred to before me, provides as follows :

The undertaking and other assets for the time being of the company whatsoever and wheresoever including its uncalled capital for the time being (if any) shall stand charged with the payment of the stock and the interest payable thereon and all other moneys hereby secured and the company hereby charges the same accordingly and such charge shall be a floating security and shall so far as regards so much of the undertaking as is charged in favour of the holders of the first second and third stocks rank after and in subordination thereto and to the securities for the same but the company shall not execute any mortgage or give any other charge without the consent of the trustees to take precedence of or rank equally with the charge hereby created except as hereinbefore provided. A

The second and third stock being redeemable, as I have said, on Jan. 1 1940, the company has issued this summons, to which the trustees of the Bolivia stock are defendants. The summons raises a number of somewhat lengthy questions, but in the course of the discussion before me it appeared that the short and important point which the parties wish to have decided is whether or not, on the true construction of the Companies Act, 1929, s. 75, the company has power to redeem the second and third debenture stock and re-issue it with a different date for redemption. B
The Companies Act, 1929, s. 75, provides as follows : C

(1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, then (a) unless any provision to the contrary, whether express or implied, is contained in the articles or in any contract entered into by the company ; or (b) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled, the company shall have, and shall be deemed always to have had, power to re-issue the debentures, either by re-issuing the same debentures or by issuing other debentures in their place. (2) On a re-issue of redeemed debentures the person entitled to the debentures shall have, and shall be deemed always to have had, the same priorities as if the debentures had never been redeemed. (3) Where a company has power to re-issue debentures which have been redeemed, particulars with respect to the debentures which can be so re-issued shall be included in every balance sheet of the company. D
E

I do not think that subsect. (4) is material for the present purpose. Subsect. (5) provides as follows :

The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the passing of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued : Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp duty and penalty. F
G

It is not suggested that subsect. (6) is of any assistance in the matter.

Mr. Wynn Parry and Mr. Gordon Brown, for the plaintiff company, contend that the power of the company to re-issue debentures empowers it to re-issue with a different date for redemption. Mr. Wynn Parry puts his argument in this way. He says that, on the subsection, the company could re-issue any debentures, including those which it redeemed on the date of maturity, and that the power was not restricted to debentures redeemed prior to the date for redemption. He says that there is H

no such express restriction in the subsection, and no words in the subsection which, by necessary implication, raise such a restriction. Then he goes on to say that, if this part of his argument is correct, the company must have power to make the date of redemption a later date. The point is a very short one. I have no doubt that it is also a very important one,

A but it seems to me to turn upon the words "power to re-issue the debentures," and it gives that power to re-issue the debentures in either of two different ways, (i) by re-issuing the same debentures, or (ii) by issuing other debentures in their place. For my part, I cannot see that the power to re-issue these debentures can extend to give the company power to

B issue debentures which are not the same in their terms as the original debentures. I think that Mr. Andrewes Uthwatt, for the defendants, is right when he says that there are two ways in which the company can carry out the transaction. It can either re-issue the same piece of paper or issue in its place another piece of paper which must contain the same

C provisions. It seems to me that, if the company has power to make the variation which Mr. Wynn Parry suggests, it would be a strange thing, and it would affect, or might affect, adversely the rights of the holders of subsequent securities. I do not know where the line could be drawn if the company could make this variation. I suppose that, if the date for

D redemption could be postponed on a re-issue, the debentures could be made perpetual debentures. I do not think that that is the intention of the section. I think that the section, as it was put in argument, only gives power to revive the original transaction, and not to enter into a new and different transaction. Further, I think that this construction

E of the section is supported by subsect. (5), dealing with the question of stamp duty. I think that there again the words "the re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company" refer again either to the re-issue of the same piece of paper or to the

F issue of another piece of paper in its place. The subsection provides for the protection of any person who, in good faith, lends money on the security of a debenture which has been re-issued, but only once stamped, and which ought to have been in fact stamped twice over by reason of its having been re-issued.

G For these short reasons, I think that the debentures which are re-issued, or the debentures which are issued in their place, must contain the same provisions as to redemption as the original debentures which have been redeemed.

H Solicitors : *Slaughter & May* (for the plaintiffs) ; *Coward, Chance & Co.* (for the defendants; the trustees of the fourth debenture stock).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

**Re LONDON-PORTSMOUTH TRUNK ROAD (SURREY)
COMPULSORY PURCHASE ORDER (No. 2), 1938.**

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Macnaghten and Singleton, JJ.), **March 28, April 21, 1939.**]

Highways—Trunk roads—Improvement—Compulsory purchase order—Trunk road lowered to pass under cross-road—Powers of Minister—Public local inquiry—Procedure—Evidence of necessity or purpose of purchase—Trunk Roads Act, 1936 (c. 5), ss. 3 (1), 6 (3).

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A public local inquiry into a proposed compulsory purchase order affecting the London-Portsmouth trunk road was held by an inspector. At the inquiry, a representative of the Minister of Transport made an opening statement giving figures of fatal accidents on the portion of the road to which the order related and the reasons thereof, and figures to show congestion of traffic at the junction of the Kingston by-pass and the Hook Road, and stating how it was proposed to alter or improve the road after the acquisition of the lands included in the order, including the excavation of the central portion of the by-pass and making such central portion pass under the Hook Road with two double traffic lines as in a tunnel, and having a road on either side of such central portion level with and connecting with the Hook Road, all in accordance with detailed plans produced by the representative. At the end of the opening statement, which concluded the case put forward in support of the order, counsel proposed to cross-examine the representative on behalf of the objectors to the order, but the inspector ruled that he was only present to give explanations, was not a witness, and could not be cross-examined. Later, it was contended on behalf of the objectors that the proposal, if carried out, would cause serious loss and damage to the trade carried on by them at fully licensed premises situate on the north-west corner of the junction of the Kingston by-pass and the Hook Road, because of the diversion of traffic underground and out of sight, and that such scheme was not within the powers of the Minister of Transport under the relevant statutes. Evidence was also given by other objectors criticising adversely the proposal to carry the by-pass under the Hook Road as proposed, from the point of view of the safety and convenience of traffic. Nevertheless, the Minister of Transport proposed to carry out the scheme as originally devised. It was now contended that the scheme was *ultra vires*, and that, as there was no evidence upon which the Minister of Transport could properly make the compulsory purchase order for the purpose of carrying such scheme into effect, the compulsory purchase order should be quashed :—

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HELD : (i) as the Trunk Roads Act, 1936, s. 3, invests the Minister with all the powers of a highway authority, full powers were thereby conferred upon him, not only to carry out improvements of the trunk roads under his charge, but also to construct new roads. Moreover, as it could not be said that the proposed subway was not an "improvement" within the meaning of the Act, and as the proposed dual carriageways were plainly "new roads," the Minister was not acting beyond his lawful powers.

(ii) as the object of the inquiry was to hear the objections to the proposals, it was not essential that evidence should be called on behalf of the Minister, and the inquiry was, therefore, not invalidated in any sense. Nor was there anything in the conduct of the inquiry to justify the quashing of the compulsory purchase order.

[EDITORIAL NOTE.] The real question at issue here is the extent of the transfer of the powers of the highway authorities to the Minister of Transport by the Trunk Roads Act, 1936, and it is held that the general words of the statute transferring all functions exercisable by highway authorities give the Minister all the powers of

the ordinary highway authorities. On a second point—and this is one of considerable practical importance—it is held that, at a public local inquiry, the official of the Ministry has not to justify the proposed purchase of land. The object of the inquiry is to hear objections, and not to prove that the powers of the Minister are being properly exercised.

- A AS TO TRUNK ROADS, see HALSBURY, Hailsham Edn., Supp., Highways, para. 247; and for the Trunk Roads Act, 1936, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 29, p. 185.]

- B MOTION to quash a compulsory purchase order, dated July 28, 1938, made by the Minister of Transport under the Trunk Roads Act, 1936, and the Restriction of Ribbon Development Act, 1935, s. 13, whereby the Minister was authorised to acquire compulsorily certain lands in the parish of Hook, which adjoin the Kingston by-pass. The purpose of the proposed acquisition was the improvement of the by-pass. The facts and the arguments are set out in the judgment of the court delivered by LORD HEWART, L.C.J.

- C The Trunk Roads Act, 1936, ss. 3 (1), 6 (3), provides as follows :

- D 3. (1) Upon any road becoming a trunk road, then in relation to the road, all functions which immediately before the road became a trunk road were exercisable by highway authorities as respects county roads and county bridges, and any functions of construction, maintenance, repair or improvement exercisable as respects that road by a local authority under any Act, including any private or local Act, shall, except as otherwise expressly provided by this Act, be exercisable by the Minister to the exclusion of any other authority; and all enactments relating to those functions shall have effect accordingly, but subject in the case of the enactments specified in the second schedule to this Act to the modifications specified in the second column of that schedule.

- E 6. (3) Where the Minister considers that it is expedient that any road across a trunk road should pass under or over the trunk road, he may for that purpose construct a bridge under or over the trunk road, and such connections between the trunk road and the other road as he considers desirable, and may also construct approaches to any such bridge or connection; and for the purposes of this Act the construction of any such bridge, connection, or approach shall be deemed to be an improvement of the trunk road: Provided that (a) the Minister shall not construct any such bridge, connection or approach except after consultation with the council of the county in which the road across the trunk road is situated and, where that road is vested in some other council, also with that council; and (b) any such connection or approach, other than an approach to a bridge carrying a trunk road, shall, when constructed, vest in the council in whom the road across the trunk road is vested, and shall be deemed to be part of that road, and that council shall be responsible for the maintenance and repair of any such connection or approach vested in them.

- F *H. G. Robertson and Patrick Browne for the applicants.*
Valentine Holmes and H. P. J. Milmo for the Minister of Transport.

- G LORD HEWART, L.C.J. [delivering the judgment of the court]: This is a motion to quash a compulsory purchase order, dated July 28, 1938, made by the Minister of Transport under the Trunk Roads Act, 1936, and the Restriction of Ribbon Development Act, 1935, s. 13, whereby the Minister is authorised to acquire compulsorily certain lands in the parish of Hook which adjoin the Kingston by-pass. The order is entitled the London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2), 1938, and it states that the purpose for which these lands are to be acquired is the improvement of the Kingston by-pass.

The lands in question are situate at the place where the road from Surbiton to Leatherhead, called the Hook Road, crosses the by-pass. At the north-east corner of the cross-roads there is a road-house, called the Ace of Spades, with a petrol station adjoining it. The applicants in this case are Mrs. Dorothy Eva Hersey, the owner of the road-house, and the Ace of Spades Petroleum Co., Ltd., the occupiers of the petrol station. A The lands to be acquired under the compulsory purchase order include part of the lands belonging to the applicants, who object to the order on the grounds that the Minister had no right to make it and that it is invalid.

By the Trunk Roads Act, 1936, s. 1, it was provided that the principal roads in Great Britain, constituting the national system of routes for through traffic, which by virtue of the Act became trunk roads, should be known by that name, and that, as from the date upon which any road became a trunk road, the Minister of Transport should be the highway authority for the road. The Kingston by-pass forms part of the London-Portsmouth road, which by virtue of the Act became a trunk road on Apr. 1, 1937, and since that date the Minister of Transport has been the highway authority for the by-pass. When the by-pass was constructed some 15 years ago, the volume of the traffic which would use it was not foreseen, so it was constructed as a single 30-ft. carriageway, and at the Hook cross-roads a small roundabout—the diameter of the central island being no more than 60 ft.—was made to accommodate the crossing traffic. The traffic using the by-pass is very much greater than was expected, and the result is that the original single 30-ft. carriageway is inadequate, and there is considerable congestion during the peak hours at the Hook cross-roads. B C D E

In these circumstances, the Minister of Transport—as the highway authority for the by-pass—proposes to substitute dual carriageways 30 ft. wide for the original single 30-ft. carriageway, and to improve the roundabout at the Hook crossroads by increasing the diameter of the central island from 60 ft. to 143 ft. The lands to be acquired under the compulsory purchase order (including the lands belonging to the applicants) are required for the purposes of effecting those improvements. F If the Minister proposed to do no more than that, the applicants, so far from objecting to the compulsory purchase order, would have approved it heartily, so we were told by Mr. Robertson, appearing on their behalf. G However, the Minister does in fact propose to make further provision for the by-pass traffic. A great part of that traffic is through traffic. It so happens that on the by-pass there is a rise to the Hook cross-roads both from the east and from the west, and the Minister proposes to excavate the ground under the enlarged roundabout and to construct dual carriageways beneath it for the through traffic. The result of this work will be that, whereas at present the Ace of Spades road-house and petrol station stand in full view of all the traffic on the by-pass, they will no longer be visible by the through traffic passing beneath the roundabout. The H

applicants apprehend that they will thereby lose some custom which might otherwise come their way, and they submit that the Minister had no power to make this subway for the through traffic, and that the compulsory purchase order ought, on that ground, to be quashed.

Mr. Milmo, for the Minister of Transport, submitted that, even if there were no power to make the proposed subway, that fact would afford no valid reason for quashing the compulsory purchase order. The order, on the face of it, is valid, and the lands to be acquired compulsorily are admittedly needed for the purpose of effecting a desirable improvement of the by-pass, which is beyond all question within the powers entrusted to the Minister. If the Minister in fact proposes to do something else which he ought not to do, that is no reason for preventing him from doing that which he ought to do. Moreover, the applicants can take such other proceedings as they may be advised to restrain or prohibit the Minister from committing the supposed illegality. We think that the submission made by Mr. Milmo on this part of the case is well-founded, and it is sufficient to dispose of the motion now before the court. It is nevertheless desirable to consider whether the construction of carriageways beneath the Hook cross-roads would in fact be beyond the powers of the Minister. The Trunk Roads Act, 1936, s. 6 (3), enables the Minister, where he considers it is expedient that any road across a trunk road should pass under or over the trunk road, to construct a bridge "under or over the trunk road," and it is said that, although the subsection enables the Minister to make a subway for the cross-road under the trunk road, it does not enable him to make a subway for the trunk road under the cross-road. It gives him—so it is said—no power to make any alteration of the trunk road. However, even if that narrow construction of the powers conferred by that subsection were correct, we consider that he has authority, apart from that subsection, to construct the proposed subway. Invested, as he is, by sect. 3 of the Act with all the powers of a highway authority, he has full power, not only to carry out improvements of the trunk roads under his charge, but also to construct new roads. The court cannot say that the proposed subway is not an "improvement" within the meaning of the Act, and in any case the dual carriageways which are to be constructed under the Hook cross-roads are plainly "new roads." We therefore think that the contention that the Minister is proposing to do what is beyond his lawful powers fails.

The applicants, in their notice of motion, put forward a second ground for the quashing of the compulsory purchase order :

That at the public local inquiry into the matter of the draft order held on June 1, 1938, no witness was called in support of the said scheme, and H. Martyn Hooke, Esq., who was appointed by the Minister of Transport to hold such inquiry, ruled that objectors were not entitled to cross-examine the representatives of the Minister of Transport thereat.

This local inquiry was duly held pursuant to the requirements of the Restriction of Ribbon Development Act, 1935, s. 13, and the procedure to be followed is laid down by the Local Government Act, 1935, ss. 160,

161, 162, as modified by the Trunk Roads Act, 1936. At such an inquiry the Minister of Transport is in a somewhat peculiar position, since he is the person who makes the draft order which is the subject-matter of the inquiry and he is also the person who, by one of his inspectors, holds the inquiry. It is plainly the duty of the Minister and his representatives to give to the public, as well as to those who may be directly affected by his proposals, the fullest information with regard to those proposals and to explain clearly the purposes he has in view, and how such purposes will be achieved, and also the statutory or other authority under which the proposals are made. We emphasise this point as a matter of great importance in the public interest. A

From the evidence filed on the motion, it appears that at the inquiry Mr. E. B. Hugh-Jones, an engineering inspector of the Ministry of Transport, representing the divisional road engineer of the Ministry, read a statement setting out the Minister's proposals for the improvement of the by-pass, and produced the documents and plans referred to therein, and, in answer to questions addressed to him, gave certain further explanations and information. No evidence was called on behalf of the Minister, and, since the object of the inquiry was to hear objections to the proposals, it was not essential that evidence should be called on his behalf. It was for the objectors to state their objections and to call such evidence as they might think proper in support of those objections. Mr. Hugh-Jones, while ready to answer questions as to the nature of the Minister's proposals, objected to answering questions as to the necessity for those proposals and as to alternative schemes for improvements suggested by or on behalf of the objectors. We are unable to see that anything which took place at the inquiry invalidates it in any sense, and equally we are unable to find anything in the conduct of the inquiry which leads us to think that the compulsory purchase order should be quashed. In our opinion, neither of the grounds for impeaching the validity of the order which were put forward in the notice of motion can be sustained, and the motion must, therefore, be dismissed. B C D E F

Motion dismissed with costs. Leave to appeal to the Court of Appeal.

Solicitors: *Blundell, Baker & Co.* (for the applicants); *Treasury Solicitor* (for the Minister of Transport). G

[Reported by MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

BRITANNIA ELECTRIC LAMP WORKS, LTD. v.
D. MANDLER & CO., LTD., AND MANDLER.

[KING'S BENCH DIVISION (Branson, J.), April 4, 5, 1939.]

Bills of Exchange—Indorsement—"Pay to our order"—Acceptance by company—Indorsement by managing director—Presentment for payment at a particular place—Bills of Exchange Act, 1882 (c. 61), ss. 26, 87.

A A document instructing payment of £100 "2 months after date to our order" was not signed by any maker, but across it was written: "Accepted and payable at 2, Manville Road, Balham, S.W.17." Following these written words were words impressed by a rubber stamp, "M., Ltd.," with a space, and then further words impressed by the rubber stamp: B "Managing Director." The managing director M. had written his name in the space, and had also signed his name on the back of the document. There was no evidence that the document was ever presented for payment at the address mentioned:—

C HELD: (i) in the absence of evidence that the document was ever presented for payment at the address mentioned, the action must fail.

(ii) the document stating "Pay to our order," the signature on the front being the signature of the company, and the signature on the back being the personal signature of M., the document was, therefore, inchoate and inoperative.

D (iii) the Bills of Exchange Act, 1882, s. 26, applies only where words are added to a signature showing a representative character, or showing that the signature is made for and on behalf of a principal, and, therefore, it did not apply to the indorsement in the present case.

E [EDITORIAL NOTE. This case is really decided upon the first point mentioned above, but the remaining points are fully dealt with in the judgment. A direction to pay to the order of one or more persons is commonly left in one of the usual forms in which such documents as bills of exchange and promissory notes are printed. It is not unusual, therefore, to find that they are more or less inconsistent with the other parts of the document, and, as there is little authority upon the result of such inconsistency, this decision will be welcomed by those having to deal with this class of documents.

AS TO BILLS PAYABLE TO ORDER, see HALSBURY, Hailsham Edn., Vol. 2, p. 618, para. 845; and FOR CASES, see DIGEST, Vol. 6, pp. 32-34, Nos. 210-225.]

F Cases referred to:

(1) *Chapman v. Smethurst*, [1909] 1 K.B. 927; 1 Digest 646, 2666; 78 L.J.K.B. 654; 100 L.T. 465.

(2) *Elliott v. Bax-Ironside*, [1925] 2 K.B. 301; Digest Supp.; 94 L.J.K.B. 807; 133 L.T. 624.

G (3) *Mason v. Lack* (1929), 140 L.T. 696; Digest Supp.

H ACTION to recover £105 7s. 6d., the amount alleged to be due to the plaintiffs as holders for value of a document dated Sept. 23, 1937, which the plaintiffs alleged to be a promissory note. The document bore on its face the following words: "£100. Sept. 23, 1937. Two months after date pay to our order the sum of £100 for value received." There was no drawer's signature, but across it was written, "Accepted and payable at 2, Manville Road, Balham, S.W.17," followed by "D. Mandler and Co., Ltd.—Managing Director," stamped with a rubber stamp. Between the words "D. Mandler and Co., Ltd.," and "Managing

Director," D. Mandler signed his name, and the name D. Mandler appeared on the back of the document.

R. Gatty for the plaintiffs.

W. A. L. Raeburn for the defendant Mandler.

Gatty : It has long been recognised that an incomplete bill can be a promissory note : *Mason v. Lack* (3). Acceptance amounts to a promise A to pay. Upon indorsement, the bill becomes a promissory note. I rely on the Bills of Exchange Act, 1882, s. 26, because, in order that the document may be a promissory note, the same name must appear on the front and on the back of the document, if the bill is to have any validity at all. It is the company's note and the company's indorsement, and other words B merely indicate the agency of D. Mandler.

Raeburn : *Chapman v. Smethurst* (1) and *Elliott v. Bax-Ironside* (2) are authorities in favour of the defendant. In the latter case, the additional words were held to be mere surplusage. The signature "D. Mandler" is an indorsement on behalf of the company, if it can be C regarded as an indorsement at all, but the instrument may be inchoate. If the document can be regarded as indorsed by the company, then it comes within the Companies Act, 1929, s. 30. No promise is specified on this document. The Bills of Exchange Act, 1882, s. 83 (2), provides that an instrument in the form of a note payable to a maker's order is D not a note within the meaning of the section unless and until it is indorsed by the maker. The Companies Act, 1929, s. 93, is a penal section, and must be construed strictly. It does not apply to the facts of this case, because it relates to documents in which the company's name is not mentioned in the manner required. What is forbidden by the section is to E sign on behalf of the company a particular document, in which the company's name is not mentioned in legible characters. The case does not come within the Bills of Exchange Act, 1882, s. 26, because there is no addition of any words creating ambiguity on the question of whether Mandler is signing on his own behalf or as a director on behalf of the company. F The document fails altogether. It is not a negotiable instrument. The Bills of Exchange Act, 1882, s. 87, provides that, where a promissory note is, in the body of it, made payable at a particular place, it must be presented for payment at that place in order to render the maker liable, and sect. 87 (2) provides that presentment for payment is necessary in G order to render the indorser liable. This action must fail for want of evidence that the document was presented.

Gatty, in reply : There is no reference in *Chapman v. Smethurst* (1) to the Bills of Exchange Act, 1882, s. 26, which is mandatory. Taken in conjunction with sect. 26, the words on the front of the document make H the defendant personally liable. If it is not the second defendant's personal note, it must be the company's note. In that case, I rely on the Companies Act, 1929, s. 93. There are circumstances in this case which bring it within *Elliott v. Bax-Ironside* (2). If an acceptance can be good without stating the name of the company, an indorsement can

be a good indorsement without stating the name of the company. The letter of Nov. 22 shows that presentment was waived.

BRANSON, J. : This is an action which is brought on a document which is said to be a promissory note, and the action is brought against
A two defendants, D. Mandler & Co., Ltd., and D. Mandler. It is alleged that the plaintiffs claim as holders for value of a promissory note for £100, dated Sept. 23, 1937, made and/or indorsed by the defendant D. Mandler on his own behalf or on behalf of the defendant company, and payable 2 months after date. No payment has been made upon the document,
B and the first contention which is raised on the part of the personal defendant, who alone defends, is that, assuming it to be a promissory note, he is not the maker of it, but that the limited company is the maker of it, and that he is responsible, if at all, as an indorser. In that event, he
C a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. Then subsect. (2) provides as follows :

Presentment for payment is necessary in order to render the indorser of a note liable.

D Then subsect. (3) says that the presentment for payment must, if in the body of the note it is made payable at a particular place, be made at that particular place in order to render the indorser liable.

It is said that here there has been no presentment for payment at 2, Manville Road, Balham, S.W.17, which is the place specified in the
E body of the note, and upon that ground it is contended that, whatever else may be true in this case, the action must fail, there having been no proof of presentation at that place. That is true, and the only way of escape presented on behalf of the plaintiff is that the presentation was waived. I am referred to a letter in the correspondence in which, upon
F Nov. 22, 1937, Mr. Mandler, signing again D. Mandler, and subsequently D. Mandler & Co., Ltd., refers to this bill, saying, "I regret to say that I am unable to meet the same," and suggests an appointment to make some arrangement in the future regarding the payment. No
G evidence was given with regard to such appointment, and no doubt that letter would amount to a waiver of the presentation upon the due date, but I cannot think that it can properly be read as a waiver of a presentation for ever, and on that ground, it seems to me, this case must fail. There are several other grounds of very great difficulty for the plaintiff which have been raised in this case, and I think that it is
H right that I should state shortly my views upon them, although, if I am right in the view I have already taken on the matter of presentation for payment, these questions do not really arise.

The document is a very curious one. It reads as follows :

£100. September 23rd, 1937. Two months after date pay to our order the sum of £100 for value received.

It is not signed by anybody as maker, but across it is written : " Accepted and payable at 2, Manville Road, Balham, S.W.17." Then there is a rubber stamp " D. Mandler & Co., Ltd.," with a space, and then the rest of the rubber stamp " Managing Director," and in the space D. Mandler signs his name. The first point that is urged upon me is that I should read that document as constituting a promissory note and that I should neglect the rubber stamp altogether and read it as a promissory note made by D. Mandler. I am quite unable to do that. I think that *Chapman v. Smethurst* (1) is ample authority for the proposition that, in reading documents of that sort, one must not shut one's eyes to the way in which the signature is put upon them. In fact, I think that it would be doing the utmost violence to the writing upon this instrument to construe it as being anything but the signature of the company. It is true that in different circumstances, different considerations having arisen, the Court of Appeal in *Elliott v. Bax-Ironside* (2) construed certain indorsements put upon a bill by two of the directors as making those directors personally liable. The signature there, however, was : " Fashions Fair Exhibition, Ltd. A.B. and C.D. Directors." It was held that in that case—particularly in view of certain correspondence which had passed indicating that the plaintiff would not accept the bill, unless it was personally indorsed by the directors—the names of the two directors coming after the signature were merely descriptive, and did not indicate that the signatories had put their signatures to that document merely in a representative character. It is said that, that being so, the document, for what it is worth, is a document which is accepted by the company, and it is payable. I think that it is also material to the consideration of the question whether or not one can disregard the reference to the company in the signature to notice that it says, " Pay to our order," whereas, if it was the personal business of D. Mandler, the word " our " would be out of place, and it should have been " my." To whose order is this ? To " our order "—that is, the company's order—and, unless I can read the signature on the back of it—" D. Mandler," without any description of any kind upon it—as being an indorsement by the company, the document is inchoate, and really has not been made by anybody at all.

It is suggested that by virtue of the Bills of Exchange Act, 1882, s. 26, I can read the plain signature of D. Mandler on the back of this document as being the signature of the company. I think that that argument is based upon a misunderstanding of sect. 26. The section refers to a case where a person signs a bill as a drawer, indorser or acceptor and adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative character, and the section says that he is not liable thereon. It continues as follows :

... but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

Stopping there for a moment, the circumstances referred to in sub-section. (1) only arise where there has been, in addition to the signature of

a person, some words describing him as an agent, or as filling a representative character, and where the question arises whether his signature is to be taken as put upon the bill merely as the representative of a principal or whether the added words are to be read merely as descriptive of him, and subsect. (2) draws attention to the fact that, in construing the ambiguous signature, the construction most favourable to the validity of the instrument must be adopted.

Here there are not in this indorsement any words of any kind. There is merely the name of D. Mandler, and, to my mind, it is impossible to relate the Bills of Exchange Act, 1882, s. 26, to such a case at all. From this, it results that I cannot construe the signature on the back of this document as the signature of the company. Therefore, the document is futile, because the company says "Pay to our order," and it has not given any order as to the person to whom payment should be made. Thus, apart altogether from the question of lack of notice of dishonour, the case must fail. In those circumstances, I give judgment for the defendant with costs.

Judgment for the defendant with costs.

Solicitors: *Edgar H. Hiscocks* (for the plaintiffs) ; *A. Kerstein & Co.* (for the defendant Mandler).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

R. v. JUDGE DRUCQUER, *Ex parte* SPELLER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Macnaghten and Singleton, JJ.), **March 30, April 21, 1939.**]

County Courts—Jurisdiction—Question of title to hereditament—Easement—Whether "hereditament in respect of which the easement is claimed" exceeds £100 per year and refers to both dominant and servient tenements—County Courts Act, 1934 (c. 53), s. 51.

An action was commenced in the county court whereby the plaintiff claimed a right of way over the defendants' land adjoining the plaintiff's house. It was admitted by the plaintiff that the rent payable by the defendants under a lease for the whole of their land, including the strip of land over which the right of way was claimed, amounted to £250 per annum. The defendants contended that, as the value and/or rent of the defendants' land over which the right of way was claimed exceeded the sum of £100 per annum, the action should be transferred to the High Court, on the ground that the county court had no jurisdiction in the matter. The county court judge made an order accordingly, and it was then sought to have the order set aside on the ground that, as the value of the plaintiff's property (the dominant tenement) was less than £100 per annum, the matter was within the jurisdiction of the county court :—

HELD : on a proper construction of the County Courts Act, 1934, s. 51, the jurisdiction of the county court is ousted if the value or the rent of either the dominant or the servient tenement exceeds £100 per annum. As it was admitted by the plaintiff that the rental of the hereditament over which the right of way was claimed exceeded £250 per annum, the county court judge was, therefore, right in ordering that the action be transferred to the Chancery Division of the High Court.

[EDITORIAL NOTE.] The limitation of the county court jurisdiction where the title to land comes into question is well known. The case of the title to an easement raises a special point, in that there is both a dominant and a servient tenement and the question is whether the limitation refers to the value of only one of these tenements or both. It is held that the limitation applies to both, and thus if the value or rent of either exceeds £100 there is no jurisdiction in the county court to try a case in which the title to the easement comes in question. A

AS TO COUNTY COURT JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 8, p. 176, para. 276; and FOR CASES, see DIGEST, Vol. 13, pp. 479, 480, Nos. 294-297. See NEW COUNTY COURT PRACTICE, 1939, pp. 57, 58.]

Cases referred to :

- (1) *Hawkins v. Rutter*, [1892] 1 Q.B. 668; 13 Digest 479, 293; 61 L.J.Q.B. 146. B
- (2) *Horth v. Sutcliffe*, [1895] 2 Q.B. 358; 13 Digest 480, 296; 64 L.J.Q.B. 729; 73 L.T. 277.
- (3) *Stolworthy v. Powell* (1885), 55 L.J.Q.B. 228; 13 Digest 479, 295; 54 L.T. 795.
- (4) *Bassano v. Bradley*, [1896] 1 Q.B. 645; 13 Digest 480, 297; 65 L.J.Q.B. 479; 74 L.T. 553. C

RULE *nisi* for order to hear and determine. The facts and the arguments are fully set out in the judgment of the court delivered by LORD HEWART, L.C.J.

Hon. Dougall Meston showed cause. D

F. W. Beney in support of the rule.

LORD HEWART, L.C.J. [delivering the judgment of the court]: On Aug. 9, 1938, Mrs. Mary Ellen Speller commenced an action in the Willesden County Court against Glyn Properties, Ltd., and by her particulars of claim she claimed (i) £5 damages, (ii) a declaration that she had a right to use the existing method of egress and ingress to her garage and a right of way over the adjoining roadway for that purpose, and (iii) an injunction restraining the defendants, their servants and agents from maintaining a brick wall so as to interfere with her rights, and from continuing to threaten the plaintiff with regard thereto. The defendants are the owners or lessees of land which adjoins the plaintiff's house—No. 1, Derek Avenue, Monks Park, Wembley—and it is over their land, or part of it, that the plaintiff claims a right of way. Particulars of defence were delivered on Aug. 18, 1938. It is necessary to refer to paras. 9 and 10 only, which are as follow : E

9. The value and/or rent of the defendants' property and/or the defendants' property over which the alleged right is claimed by the plaintiff exceeds the sum of £100 per annum. F

10. By reason of the matters hereinbefore stated the defendants contend that the county court has no jurisdiction to deal with the plaintiff's claim or any part thereof in this action, and ask that this action should be transferred to the High Court of Justice, where the defendants will ask *inter alia* for a declaration that the title to the land over which the alleged right of way is claimed has been and is still vested in the defendants and not in any other persons or authority. G

On Sept. 8, 1938, the defendants gave notice of application for an order (i) that the plaintiff's claim and all proceedings in the action be struck out in pursuance of the County Courts Act, 1934, s. 64, or (ii) that H

all further proceedings in the action be transferred to the High Court, in pursuance of sect. 51 of the Act, on the ground that the county court had no jurisdiction to hear and determine the same. The application was heard by His Honour JUDGE DRUCQUER on Oct. 7, 1938, and an order was made by him that the action be transferred to the Chancery

A Division of the High Court of Justice. On Oct. 28, 1938, this court ordered that Nov. 21 be given to His Honour JUDGE DRUCQUER to show cause why he should not proceed to hear and determine the action upon the grounds stated in the order, and it was further ordered that notice of the order be given to the county court judge and Glyn Properties, Ltd. (the defendants in the action).

B On the hearing before us on Mar. 30, 1939, the county court judge was not represented. Mr. Meston appeared on behalf of Glyn Properties, Ltd., to show cause, and he submitted that the order made by the county court judge was right, in view of the terms of the County Courts Act, 1934, s. 51, which provides as follows :

C A county court shall have jurisdiction to hear and determine any action in which the title to any hereditament comes in question, being an action which would otherwise be within the jurisdiction of the court (a) in the case of an easement or licence, if neither the value nor the rent of the hereditament in respect of which the easement or licence is claimed, or on, through, over or under which the easement or licence is claimed, exceeds the sum of £100 by the year . . .

D It was common ground that the title to the right of way came in question, and consequently the decision depends upon the true construction of sect. 51 (a).

E It is clear that the words "if neither the value nor the rent of the hereditament in respect of which the easement is claimed, or on, through, over or under which the easement is claimed, exceeds the sum of £100 by the year" can be read in more ways than one. It is to be regretted that no attempt was made to clarify the position in the County Courts Act, 1934, for there had been various questions raised in regard to its predecessor, sect. 60 of the Act of 1888.

F In THE ANNUAL COUNTY COURTS PRACTICE, 1939, p. 60, there appears the following statement :

Where county courts have not thus complete jurisdiction irrespective of any question of title, two questions have to be decided to ascertain whether the court has jurisdiction or not—first, is title in question? second, does the yearly rent or value exceed £100?

G This observation, of course, leaves untouched the question whether, in a case such as the present, regard must be had to the rent or value of both dominant and servient tenements, or whether the county court has jurisdiction if one of them does not exceed the sum of £100 by the year.

H Mr. Meston argued somewhat faintly that "the hereditament in respect of which the easement is claimed" could be read as meaning the servient tenement, and, consequently, that only the servient tenement was referred to in subsect. (a). The chief part of his argument was, however, directed to showing that, if the reference in subsect. (a) was to both the dominant and the servient tenements, then the fact that the value of

the rent of either exceeded £100 by the year would oust the jurisdiction of the county court.

From para. 6 (d) of the affidavit of Mrs. Speller, it appears to be agreed that :

... the rent payable by Glyn Properties, Ltd., under a lease for the whole of their said land including the strip of land over which the right of way is claimed amounted to £250 per annum. A

The plan which was exhibited to her affidavit showed that a block of flats had been built on the land, and it may well be that the value of the hereditament is considerably more than £250 per annum. There was nothing before us to show any splitting up of the land into different holdings. In other words, it appears to us that we must treat the land with a rental of £250 per annum as the hereditament on, through or over which the easement is claimed. Mr. Meston accordingly submitted that the county court had no jurisdiction to hear and determine the matter in dispute. The subsection ought, he said, to be read "If neither the value nor the rent of the dominant tenement or of the servient tenement exceeds the sum of £100 by the year," and he submitted that, if the rent of either exceeds that sum, there is no jurisdiction in the county court to determine the dispute. B C

Mr. Beney, who appeared for Mrs. Speller in support of the rule, submitted that subsect. (a), omitting immaterial words, should be read as follows : "If the rent (value) of the dominant tenement or the rent (value) of the servient tenement does not exceed the sum of £100 by the year." The value of Mrs. Speller's property, No. 1, Derek Avenue (the dominant tenement), was less than £100 per annum, as deposed to in her affidavit, and that fact, Mr. Beney argued, brought the matter within the jurisdiction of the county court. In support of this argument, he cited *Hawkins v. Rutter* (1) and in particular the judgment of A. L. SMITH, J., referring to the County Courts Act, 1888, s. 60, at p. 673 : D E

But in my opinion the "easement" mentioned in that section does not apply to or include the easement of a public right of way. I think it applies only where there is a dominant and servient tenement, the value or the reserved rent of either of which does not exceed the sum of £50 by the year. F

It is apparent from the judgments of LORD COLERIDGE, C.J., and A. L. SMITH, J., that the decision in that case was founded on the fact that the defendant claimed a right, as one of the public, to ground his barge on the bed of a navigable river, and that no question of an easement such as the section contemplated arose. The question which arises in the present case was not before the court. Moreover, it is by no means clear from his judgment how A. L. SMITH, J., would have decided this case if he had had to consider it. The words to which reference has been made do not provide any guide. If the section can be read in two ways, so also can the sentence cited from the judgment. The simple answer is that the judge had not before him the question which we have to decide, and his mind was not directed to it. For these reasons, we do not think G H

that *Hawkins v. Rutter* (1) affords any guidance in the case which we have to decide.

More help is to be gained from a consideration of *Howorth v. Sutcliffe* (2), in which a plaintiff sued in the High Court for damage to his reversion by reason of the defendant's interference with the flow of water through a pipe under the defendant's land to which the plaintiff claimed to be entitled in respect of his premises. The defendant paid into court the sum of 40s., with a denial of liability. The plaintiff took the 40s. out of court, and the question which the Court of Appeal had to decide was whether the plaintiff was entitled to have his costs taxed on the High Court scale. If he could have brought his action in the county court, he was not entitled to any costs. KAY, L.J., held that the plaintiff's title was put in question, and that the case could not have been tried in the county court. He referred to *Hawkins v. Rutter* (1), and at p. 362 referred to the words of A. L. SMITH, J., in that case, at p. 673 :

... the easement mentioned in that section [the County Courts Act, 1888, s. 60] does not apply to or include the easement of a public right of way. I think it applies only where there is a dominant and servient tenement, the value or the reserved rent of either of which does not exceed the sum of £50 by the year.

In the same case, A. L. SMITH, L.J., agreeing, said, at p. 363 :

As I understand the Act and the cases thereon, the law as to whether an action brought in the High Court could have been commenced in a county court depends upon whether, if the action were brought and tried in a county court, the title to a corporeal or incorporeal hereditament exceeding in value £50 by the year would in reality come in question. If it would, then the action could not have been commenced in a county court within the meaning of the section, for by sects. 56 and 60 the county court would have no jurisdiction to try it. It is agreed that in this case the value of the hereditaments exceeded £50 by the year . . .

Sect. 60 of the Act of 1888 is in much the same terms as is sect. 51 of the Act of 1934. The figure of £50 is now £100. The only other alteration which it is necessary to mention is that the word "hereditament" has taken the place of the words "lands, tenements or hereditaments." It is to be observed that in *Howorth v. Sutcliffe* (2) it was admitted, at p. 359 :

... that the yearly value of the hereditaments in respect of which the easement was claimed exceeded £50.

This was the only admission as to value. There is nowhere, apparently, any admission as to the value of the hereditaments on, through, over or under which the easement was claimed. The decision of the Court of Appeal appears to have been based on the fact that a question of title arose, coupled with the admission that the yearly value of the hereditaments in respect of which the easement was claimed exceeded £50.

Mr. Beney's argument before us was that, if the value of either the dominant or the servient tenement is less than the county court limit, the county court has jurisdiction. If that is so, it is surprising, to say the least, that in *Howorth v. Sutcliffe* (2) there was an admission as to the yearly value of one tenement only, and that the Court of Appeal held, on that admission, that the county court had no jurisdiction. That

decision appears to be an authority in support of Mr. Meston's submission. The county court judge in the present case decided that the county court had no jurisdiction to hear and determine the case, and we think that he was right, in view of the admission in para. 6 (d) of Mrs. Speller's affidavit that the rental of the hereditament over which the right of way was claimed amounted to £250 per annum. A

It is interesting to observe that in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 8, p. 176, para. 276, there is repeated a passage from the earlier edition to the effect that the county court has not jurisdiction to try an action claiming an easement *over* lands of greater annual value than £100 where proof of title to the easement is essential to the case. The authority cited for this proposition is *Howorth v. Sutcliffe* (2), in which case, as has been mentioned, the only admission as to value was that the yearly value of the hereditaments *in respect of which* the easement was claimed exceeded that figure (or the then county court limit). Mr. Beney also referred us to *Stolworthy v. Powell* (3), but the decision in that case does not help towards a decision in the present case. Also, some doubt was cast upon that decision by LORD RUSSELL, C.J., in *Bassano v. Bradley* (4). In our opinion, the argument put forward on behalf of the plaintiff in the action fails. The decision of the county court judge was right, and the rule must be discharged. B C D

Rule discharged.

Solicitors: *Glover, Scott & Apthorpe Webb* (showed cause); *J. H. Lambert & Co.* (in support of the rule).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.] E

KING v. MICHAEL FARADAY & PARTNERS, LTD.

[KING'S BENCH DIVISION (Atkinson, J.), April 3, 4, 5, 19, 1939.] F

Contract—Impossibility of performance—Frustration—Assignment of part of salary—Reduction of salary—Restrictions on employment—Public policy. Bankruptcy—Secured creditor—Proof of debt—No valuation of security—Loss of right to enforce security. G H

The debtor was the managing director of a company under an agreement which, for the purposes of this case, guaranteed his appointment until 1941, but required him to devote his whole time to the work of the company and placed the usual restrictions upon him after he should leave the company. In 1933, judgment was obtained against him for £34,020 16s. 4d. To avoid proceedings upon this judgment, the debtor assigned certain policies to the creditor, and also assigned to him £1,000 per annum to be paid out of his salary for a period of 10 years. To give effect to the latter assignment, the debtor signed an irrevocable request and authority to the company to pay the £1,000 for 10 years out of his salary. Upon the completion of these 10 annual payments, the judgment was to become satisfied. In 1938, after payments had been made for 5 years, the company were obliged to reduce the debtor's salary to £1,000 per annum, and about the same time a receiving order was made against the debtor. The trustee in bankruptcy allowed the debtor to retain his salary of £1,000 per annum for the maintenance of himself

and his family. The personal representative of the creditor proved in the bankruptcy for £24,852 16s. 6d., the whole amount of the debt, without giving any credit for, and without valuing, any security. The personal representative of the creditor brought this action to enforce the equitable assignment of £1,000 per annum out of the debtor's salary for the remaining 5 years of the period of 10 years for which it was assigned:—

HELD: (i) assuming that the assignment of after-acquired property was good against the trustee in bankruptcy, any property falling in after bankruptcy was not affected by it, because the debt had been discharged by the bankruptcy.

(ii) the reduction in salary was a change in an essential condition, the continuation of which must have been contemplated as the basis of the obligation, and the obligation itself had become wholly impossible of performance.

(iii) in the circumstances, it would be against public policy to enforce the obligation.

(iv) by proving in the bankruptcy for the whole debt, without any valuation of the security, the personal representative of the creditor must be taken to have surrendered the security.

(v) *Seem*: the earnings of a bankrupt over and above what is required for the maintenance of himself and his family can be charged before bankruptcy, and such a charge will give a good title against the trustee in bankruptcy.

[EDITORIAL NOTE.] The present case applies the well-known principle of frustration to circumstances to which it has seldom been applied before. It is here applied to a personal contract to pay a yearly sum of money, the frustration being that the earnings of the promisor were reduced to a sum which made payment impossible. It must be noticed at the same time that the basis of the promise was the fact that the promisor had, at the time when the promise was made, what everyone thought to be a guaranteed income sufficient to allow him to fulfil his promise. At first sight, it would seem that the proof in the bankruptcy was a complete answer to the claim in this action. Against this, it was contended that that proof might still be amended, but this contention was rebutted by the fact that no such amendment had been asked for at the date of the writ in this action, and the plaintiff's rights must, of course, be decided as at that date. In the course of the judgment, much is said as to the position of the earnings of a bankrupt during his bankruptcy, but on this point nothing is finally decided, since it was possible to decide the case on the other contentions.

AS TO FRUSTRATION OF CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 212-217, para. 296; and FOR CASES, see DIGEST, Vol. 12, pp. 383-385, Nos. 3159-3166.

AS TO SECURED CREDITOR, see HALSBURY, Hailsham Edn., Vol. 2, pp. 299-306, paras. 394-406; and FOR CASES, see DIGEST, Vol. 4, pp. 364-389, Nos. 3383-3560.]

Cases referred to:

- (1) *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454; 8 Digest 445, 205; 74 L.J.K.B. 898; 93 L.T. 495; *revsg.*, [1904] 1 K.B. 387.
- (2) *Collyer v. Isaacs* (1881), 19 Ch.D. 342; 5 Digest 695, 6121; 51 L.J.Ch. 14; 45 L.T. 567.
- (3) *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; 5 Digest 697, 6128; 58 L.J.Q.B. 75; 60 L.T. 162; *revsg.* (1886), 18 Q.B.D. 25.
- (4) *Holroyd v. Marshall* (1862), 10 H.L.Cas. 191; 20 Digest 252, 159; 33 L.J.Ch. 193; 7 L.T. 172.
- (5) *Re Reis, Ex p. Clough*, [1904] 1 K.B. 451; 5 Digest 852, 7158; 73 L.J.K.B. 929; 90 L.T. 62; *revsd. on another point*, [1904] 2 K.B. 769; *sub nom. Clough v. Samuel*, [1905] A.C. 442.

- (6) *Re Jones, Ex p. Nichols* (1883), 22 Ch.D. 782; 5 Digest 697, 6129; 52 L.J.Ch. 635; 48 L.T. 492.
- (7) *Wilmot v. Alton*, [1897] 1 Q.B. 17; 5 Digest 696, 6126; 66 L.J.Q.B. 42; 75 L.T. 447.
- (8) *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119; 12 Digest 399, 3233; 87 L.J.K.B. 370; 117 L.T. 766; *affg.*, [1917] 2 K.B. 1.
- (9) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, 3194; 85 L.J.K.B. 1389; *sub nom. Re F. A. Tamplin S.S. Co., Ltd., & Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; *affg.*, [1916] 1 K.B. 485; [1915] 3 K.B. 668.
- (10) *Re D'Epineuil (Count)* (No. 2), *Tadman v. D'Epineuil* (1882), 20 Ch.D. 758; 7 Digest 122, 699; 47 L.T. 157.
- (11) *Re Clarke, Coombe v. Carter* (1887), 36 Ch.D. 348; 8 Digest 429, 78; 56 L.J.Ch. 981; 57 L.T. 823.
- (12) *Horwood v. Millar's Timber & Trading Co., Ltd.*, [1917] 1 K.B. 305; 12 Digest 295, 2432; 86 L.J.K.B. 190; 115 L.T. 805.
- (13) *Re Roberts*, [1900] 1 Q.B. 122; 5 Digest 728, 6315; 69 L.J.Q.B. 19; 81 L.T. 467.

PRELIMINARY ISSUE OF LAW. The plaintiff claimed to enforce an equitable assignment of part of a debtor's salary. The trial of a preliminary issue of law was ordered under R.S.C., Ord. 25, r. 2, upon a defence raising the issue that the assignment was unenforceable by reason of frustration and the fact that the plaintiff had proved for the full amount of her debt in the bankruptcy of the debtor. It was also pleaded that it would be against public policy to enforce the assignment. The facts and arguments are fully set out in the judgment.

J. B. Blagden for the plaintiff.

A. S. Comyns Carr, K.C., and *Frederick Grant* for the defendants.

ATKINSON, J. : This is a case which has been set down under R.S.C., Ord. 25, r. 2, to obtain a decision of certain points of law raised in the defence. There is no dispute about the facts. On May 11, 1931, the debtor, who had already been appointed managing director of the defendant company, entered into an agreement with the company whereby it was agreed that he should hold that office until he died, or ceased for any cause to be a director, or until he resigned his office by giving 6 months' notice in writing, but that no such notice should be given before Mar. 1, 1941, that during the agreement he was to devote the whole of his time to the business of the company, that he was to be entitled to a salary of £3,000 per annum paid quarterly, and that he should not at any time while he held

... the office of managing director or afterwards, either on his own account or for any other person, firm or company solicit interfere with or endeavour to entice away from the company any person firm or company who at any time during or at the date of the determination of the employment were clients of or in the habit of dealing with the company.

It was also agreed that the company should have power to determine the agreement without notice if the managing director should become bankrupt or make any arrangement or composition with his creditors, or be guilty of gross misconduct or commit a breach of the agreement.

On Apr. 26, 1933, Mr. Jameson obtained judgment against the debtor for £34,020 16s. 4d. The judgment was by consent, and was subject to the condition that execution should be stayed provided certain terms were carried out. Jameson already had a charge upon certain policies upon the life of the debtor subject to certain advances by the insurance companies. At the date of the judgment, the policies had a surrender value, after discharge of the advances by the insurance companies, of £14,933. The terms upon which execution was stayed included an absolute assignment of these policies, payment of £500 for costs, and of a sum of £1,690, the amount of premiums already paid by Jameson on the policies, and interest which he had paid the insurance companies. Then came the terms upon which this action is based. The important ones are cl. 3 and 7. Clause 3 provided as follows :

That the defendant [the debtor] do pay to the plaintiff for a period of 10 years on account of capital owing an amount of £1,000 to be paid by equal monthly instalments commencing on May 14, 1933, and out of which the plaintiff is to pay the premiums on the life policies so to be assigned to him and the interest on the advances made thereon by the insurance companies, and that the defendant do give an irrevocable authority to Michael Faraday & Partners, Ltd., or successors so as to constitute a charge upon his salary and remuneration to pay to the plaintiff the yearly sum of £1,000 by monthly instalments out of his salary and other remuneration.

I do not think that cl. 4, 5 and 6 have any bearing on the matter. Clause 7 provides as follows :

That in case of default by the defendant in carrying out any of the above-mentioned terms the aforesaid stay of execution is to be removed and the said judgment is to be at once enforceable after giving credit off the said sum of £34,020 16s. 4d. for so much of the annual payments of £1,000 per annum as has been paid by the defendant and after deducting from such payments any insurance premiums paid by the plaintiff and also interest on the amounts loaned by the insurance companies on security of the policies calculated at the rate of 5 per cent. per annum and after giving credit for the sum of £14,933 7s. representing the amount payable at present computation upon the said policies of insurance less the sums owing for loans thereon.

Then cl. 8 provides as follows :

That upon the above terms being carried out the said judgment is to be deemed satisfied.

The policies were assigned and the £500 was paid and the £1,690 was paid. It will be observed that, in case of default, no credit was to be given for either of these payments, nor for any increase in the value of the policies due to the payment of the premiums. The irrevocable authority was given on May 10, 1933, in the following terms :

I hereby irrevocably request and authorise you to pay to Mr. Francis Hinton Jameson out of my salary a yearly amount of £1,000 for 10 years commencing from May 14, 1933 (the first payment to be made on that date) such yearly amount of £1,000 to be paid by equal monthly instalments on the 14th day of each calendar month.

That was signed by the debtor and addressed to the company. I have no doubt that that document constituted a good equitable assignment, so far as form is concerned. It seems completely within the principle of *Brandt's (William) Sons & Co. v. Dunlop Rubber Co. (1)*, at p. 462.

In pursuance of such authority, the company paid the plaintiff month by month until Feb. 14, 1938, inclusive, and they have paid him nothing since. When I say "him," I ought to say that Mr. Jameson died, and Mrs. King is his executrix. By that date, nearly £5,000 had been paid. Upon payment of another £5,000, spread over 5 years, the judgment would have been discharged. This action is brought to recover the payments alleged to be due under that agreement since Feb., 1938. Para. 3 of the defence sets out the following facts. At the end of Apr., 1938, the company's bankers, to whom the company was heavily indebted, insisted on a reduction of salaries payable by the company, and in particular insisted on the debtor's salary being reduced to £1,000 per annum. This was at once put into operation, and since May 6 the debtor has been paid at that rate. Early last year, a receiving order was made against the debtor—the date of the receiving order was Mar. 18, 1938—on an act of bankruptcy which was committed on Feb. 19, 1938, so that the debtor's bankruptcy began as on that date. I do not know what has happened to the salary due to the debtor since the commencement of the bankruptcy while it was being paid at the rate of £3,000 per annum, but, since it was reduced to £1,000, it has been paid to the debtor. That is to say, beginning in May, and from May onwards, it has been paid to the debtor. I have no doubt that at any rate part of the £3,000 was paid to the debtor between February and May, but whether or not the trustee got any of it I do not know, nor does it matter.

The debtor now claims this salary as personal earnings necessary for the maintenance of himself and his wife and family. The company and the trustees agree that he is so entitled. At any rate, the trustee has not claimed and does not claim it. As I have said, default in payment by the company was made in March and April, 1938, and thereupon Mrs. King, the plaintiff, at once proved for the whole amount of the debt for a sum of £24,852 16s. 6d. I have not been told exactly how that was arrived at, but, working it out, I think that it is fairly obvious that from the £34,000 the sum of approximately £15,000 was deducted, credit was probably given for some portion of the 5 years' payment of £1,000, and then interest must have been added at, I think, roughly about 4 per cent. up to date, making the amount up to £24,852. In other words, a judgment which, on payment of a further £5,000, would have been entirely satisfied is proved for a sum of just under £25,000. The original defence did not raise either matter which has been relied upon, but leave was obtained by consent to raise further points, and an amended defence was delivered. In that amended defence the defendant relies on the proof for this full sum of £24,852 without any credit being given at all for any security and without valuing any security or, I gather, even referring to any security, and further relies on the fact that, by her solicitor, Mr. Lewis, she has been a member of the committee of inspection, has attended meetings, and has voted in respect of the full amount of £24,000 odd, has proposed and supported resolutions and voted and lodged proxies and

so on, and has given notice of opposition to the application for the debtor's discharge. Those matters are relied upon in two ways. In the amended defence, it is said, first, that, having adopted the remedy of seeking to enforce the full judgment, the alternative terms have disappeared. Then it is said that, in any event, as proof has been made for the full amount, A without any valuation of the security, the security is deemed to have been surrendered, and, of course, if it has been, it is obvious that that is an end of the case.

A number of arguments were advanced, all of them full of interest, and some more difficult than others. I think that the first one which was B relied upon was an argument based upon *Collyer v. Isaacs* (2). I am not going to refer to these cases in detail, they are familiar to everybody, but it is said that that case laid down the proposition that, if there were an assignment of after-acquired property, which of course would include after-acquired debts, it could only be an equitable assignment, that it C could only amount to an undertaking to assign, and that, if, so far as debts or after-acquired property fell in during bankruptcy, the debtor refused to assign or the trustee refused to permit him to hand over or assign, the creditor's only remedy was to claim damages for the breach of the undertaking to assign, and that he would have to prove for the D damages in the bankruptcy, and in that way the security was discharged. I do not know whether or not that was the effect of *Collyer v. Isaacs* (2), but, if it is the effect of that case, it seems to me that it is wholly inconsistent with *Tailby v. Official Receiver* (3), and, of course, if it is inconsistent, *Tailby v. Official Receiver* (3) must hold the field. I think E that the principle of *Tailby's* case (3) is stated in its simplest form by LORD MACNAGHTEN, at p. 546 :

Long before *Holroyd v. Marshall* (4) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity F considers as done that which ought to be done, and in accordance with the maxim which LORD THURLOW said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust."

If that means anything, it means that an assignment of after-acquired property is effective, not merely as against the debtor, but also as against G his trustee. However, I doubt very much whether *Collyer v. Isaacs* (2) was intended to have the effect contended for, because I find that in *Re Reis, Ex p. Clough* (5) STIRLING, L.J., dealing with *Collyer v. Isaacs* (2), said, at p. 780 :

H In *Collyer v. Isaacs* (2) the case to be considered was one in which there was given as security for a debt an assignment of future chattels. The debtor became bankrupt, and after the bankruptcy and the order of discharge he acquired chattels which answered the description in the security ; but the creditor did not prove this debt in the bankruptcy, and it was held that the security, so far as affected his future chattels, was discharged by the bankruptcy.

It is obvious that that case was entirely different from the present one. In other words, the effect which apparently ought to be attributed to

Collyer v. Isaacs (2) is simply that, if, in the circumstances of any particular case, the debt has been discharged by the bankruptcy, then any property falling in afterwards, of course, is not touched by it, because the debt has gone. At any rate, I cannot myself see that the defendants obtain any help from *Collyer v. Isaacs* (2).

The next point which was made was this. It was argued that a man cannot charge his personal earnings to be made during a bankruptcy, because such earnings become, so it was said, due not merely to the debtor, but also to the trustee in cases like *Re Jones, Ex p. Nichols* (6) and *Wilmot v. Alton* (7) and that class of case, upon which reliance was placed. If those cases are analysed, it will be seen that in all of them the earnings in dispute were made, not by the bankrupt, but by the trustee. If a trustee permits a debtor to carry on his business, he carries it on as agent for the trustee, and it is true to say that the earnings are really the earnings of the trustee, and not of the debtor. In this case, however, the debtor is carrying on under a personal agreement. He is not carrying on in any sense as agent for the trustee. At any rate, so far as I am concerned, I am not prepared to hold that a man cannot before bankruptcy charge his personal earnings under a personal agreement over and above what is required for the maintenance of himself and his family so as to give a good title against his trustee. Therefore, I think that the argument based on *Re Jones, Ex p. Nichols* (6) fails as well.

However, the defendants have got three much more formidable defences. The first of those three is this. It is said that the conditions affecting the debtor's obligation to pay £1,000 out of his salary are so changed that the court ought to treat the obligation, and any security given to secure its performance, as at an end. This contention does not apply to the March and April instalments. It applies only to the period subsequent to the reduction of the salary to £1,000 per annum. It is also said that the change has turned the obligation into one which it would be contrary to public policy to enforce, and this, if I understand Mr. Comyns Carr aright, he uses in two ways, both as a separate point in itself and as strengthening or emphasising the extent of the change in the existing conditions. When the obligation was undertaken, the debtor had an agreement for life at a salary of £3,000 per annum. It was also one which he could not terminate until 1941, and the obligation was to pay a part only of his salary. The £1,000 was to be paid out of his salary, and in fact it left ample means for the maintenance of himself and his family. The obligation after May 6 was that, being bound to his employers for several years at a salary of £1,000 per annum, and being bound, it will be remembered, not to carry on any other business of any other kind—and if, for any reason, he did leave, he was not to approach any of his business connections or his professional connections—he would cause the whole of it to be paid to the creditor, although, being a bankrupt, he had not, and could not have, any other means of maintaining himself and his family. That obligation had become one to

work for years for nothing for the sole benefit of the plaintiff, without any possibility of maintaining himself or his wife or family. It had, in truth, become an obligation wholly impossible of performance in practice, from the common-sense point of view, for to attempt to enforce it would necessarily end it, as whether he liked it or not, whether it was right or
A wrong, the debtor would be driven to break his contract of employment, in which event, of course, the plaintiff would get nothing.

It seems to me that there had been a change in an essential condition, the continuation of which must have been contemplated as the basis of the obligation—namely, the payment of a salary which, after payment
B of the £1,000, left, at any rate, enough for the debtor and his family to live on. Further, I am certain that, if, when this agreement was made, the circumstances had been such as they are now, neither party would for a moment have dreamt of entering into such an agreement. The debtor would have said: “It is absurd; I cannot live,” and the creditor
C would have refused it because he would have said at once: “This agreement will be of no value to me. You could not perform it for a day.” At any rate, it seems to me that there had been a change in an essential condition.

I repeat that I do not want to go too much into authorities, but it seems
D to me that this case comes within *Metropolitan Water Board v. Dick, Kerr & Co.* (8), where LORD DUNEDIN said, at p. 127:

... I shall content myself with one quotation from the opinion of one of the majority [in *Tamplin's* case (9)]. EARL LOREBURN points out that in all cases it must be said that there is an implied term of the contract which excuses the party, in the circumstances, from performing the contract, and then continues [p. 404]: “It
E is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.”

I cannot help feeling that the only reasonable view here is that the condition on which that contract was made was that there should be a salary out of which the £1,000 should be paid, and a salary at least big
F enough to provide £1,000 and enough for the man to live on as well.

It is also said that it had become an obligation which it would be contrary to public policy to enforce, and I think that this argument is well founded too. I know that it has been said that public policy is an unruly horse, and all that kind of thing, but it is a principle which is
G recognised, and has been recognised repeatedly, in our law, and in particular in considering the enforceability of contracts entered into by servants. It is basis of the restraint of trade cases, and I am only going to refer to two or three quotations just to show that this is a matter which the court has to bear in mind.

In *Re D'Epineuil (Count)* (No. 2), *Tadman v. D'Epineuil* (10), which
H has been overruled on the main grounds of the decision, it was a question whether or not an instrument charging “all present and future personalty” operated on certain property. It was said by FRY, J., at p. 760:

There are many reasons why such a charge as this should not be operative as

regards undefined property not belonging to the mortgagor at the date of the execution of the deed; it would interfere with his power of maintaining himself.

Therefore, there is an inference that the power of maintaining himself was something which had to be borne in mind.

In *Re Clarke, Coombe v. Carter* (11), again the enforceability of an assignment which covered all sorts of future property was being considered. I am not interested in the decision. I am interested in something COTTON, L.J., said and something FRY, L.J., said. COTTON, L.J., said, at p. 352 : A

Again, a contract may be so wide that the court might consider it wrong to enforce it—wrong on the ground that if fully carried into effect it would prevent the party from paying his debts, and deprive him of the means of subsistence. B

In the same case, FRY, L.J., said, at p. 357 :

There may, I think, be contracts of such a nature that the court will not decree specific performance of them. It might say that a contract by a man to assign all his future property by way of mortgage was one which ought not to be enforced, because it would deprive the assignor of the means of livelihood . . . C

There again one has the principle referred to and recognised.

Lastly, in *Horwood v. Millar's Timber & Trading Co., Ltd.* (12), LORD COZENS-HARDY, M.R., said, at p. 311 :

Now can it possibly be doubted that that is a deed which is contrary to public policy? Is it open for a man in consideration of a sum of cash to bind himself not to leave the house where he is, not to sell any of his furniture and effects in the house or in any future house he may move into, which furniture is not the subject of any change in favour of the mortgagee; is it open to him to say "Whatever property I may have I will not give any kind of security upon it for any sum of money or for any debt which legally or morally I may desire to pay?" Such a covenant would prevent the man from employing a doctor or a surgeon in the case of illness in his family, and would prevent him from raising money for the maintenance of his wife and children, or for the education of the latter. I think this is a deed which the law must recognise as bad on grounds of public policy of the most well-established kind. D
E

If there is anything in that principle at all, I cannot think of any other case to which it ought to apply with greater force than to this, because it is the agreed fact that, if this agreement were enforced, it would deprive the debtor of his whole available income in circumstances which prevent him from earning any income from any other source, and everything else he had has passed to his trustee. He cannot work for anybody else. He can earn nothing, and it would effectively prevent his maintaining himself and his family, or prevent his giving them any assistance, and I am satisfied on both these grounds that the agreement ought not to be enforced by the court as from May, 1938. F
G

There are two other grounds upon which again I think that the defendant is right. The first of those is that the plaintiff, it is said, by proving in May for the full amount of her judgment, with interest, less only the agreed credits, accepted the defendants' non-payment in March and April as a repudiation of the terms upon which execution was stayed. It is said that, on the assumption that the obligation on the company to pay was enforceable, it was open to the plaintiff to elect (i) either to enforce payment of the £1,000 per annum, or (ii) to enforce the judgment for the H

full amount, but that she could not do both. She cannot have the £1,000 per annum and enforce the full judgment as well. I think that this contention is well founded, and I test it in this way. The consideration for the promise to pay £1,000 per annum out of salary for 10 years, and to give a charge on the salary, was the stay of execution on the judgment, and the acceptance of the performance of the obligation as a substitution for the judgment, but by proving for the full amount the plaintiff has put it out of her power to perform the consideration for the debtor's promise to pay the £1,000 per annum. Suppose the plaintiff succeeded in this action, got judgment, and proceeded in the coming years to get judgment against the company for the payment, at the end of that time she would have had the full £10,000, the consideration of which was to be the termination of the judgment, which was to be the full acceptance of everything, and she would have had the benefit of attempting to enforce the judgment, proving for the full amount of £25,000, and taking whatever figure may be paid. It seems to me that she had a choice. There are the two alternative remedies: "Here is the £1,000 per annum promise. Perform that and there is an end of everything. If you do not, however, then I am going to do so-and-so." It was not done. The £1,000 was not paid. Then Mrs. King elected to take the alternative course, and proceeded to do her best to enforce the whole debt. To my mind, she could not do that, and, by taking that course, she has accepted the repudiation of the obligation to pay the £1,000 per annum.

The other way in which this point is put is this. It is on the assumption that the charge on salary is an enforceable security for payment of the indebtedness, and reliance is placed upon the Bankruptcy Act, 1914, Sched. I, r. 10. It will be remembered that that rule provides as follows:

For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance . . . after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the court on application is satisfied that the omission to value the security has arisen from inadvertence.

The plaintiff did prove. The proof was admitted, and the plaintiff has voted in respect of the whole amount without any valuation of the security. Therefore, she is deemed to have surrendered it. Mr. Blagden concedes that this is a good answer, but he says that, as there is a possibility of his obtaining leave to amend his proof, I ought to do something to protect his possible rights by giving judgment for this sum for the trustee. Further, even apart from that point, he argues that, even if the security is deemed to have been surrendered, and if the plaintiff has lost her right to enforce it, the benefit of the surrender is not for the debtor or the defendants, but, of course, passes to the trustee, and, therefore, that the trustee should have judgment for this claim. Of course, the trustee is before the court as a defendant. It is quite true that the surrendering

of this security does not mean that the company is relieved. It merely means, *prima facie*, that the benefit of it would pass to the trustee. The main difficulties in the way of such a course, however, are, to begin with, that no such claim is made in the pleadings. The trustee is joined because the plaintiff, being only an equitable assignee, must have an assignor before the court. It may be possible for an assignee to argue for such a judgment in the name of his assignor when he has proved his equitable claim to be good, and when he can prove that the trustee would hold as trustee for him, the assignee, but in this case he would not be trustee for the plaintiff at all. He would be merely a trustee for the general body of creditors, and I cannot think that the plaintiff can ask for a judgment for the trustee in circumstances which would not constitute that trustee a trustee at all here. Moreover, there is the further difficulty that, in so far as the £1,000 per annum is necessary for the maintenance of the debtor and his family, it does not pass to the trustee. That seems clear from *Re Roberts* (13). The headnote there is as follows :

Under the Bankruptcy Act, 1883, s. 44, which vests in the trustee all property belonging to the bankrupt at the commencement of the bankruptcy or acquired by him before his discharge all personal earnings of the bankrupt between the commencement of his bankruptcy and his discharge belong to his trustee, save only what is necessary for the support of the bankrupt and his family.

It is clear, I think, from the judgment of SIR NATHANIEL LINDLEY, M.R., at pp. 128, 129, that the true view is that personal earnings, in so far as they are necessary for the maintenance of the debtor and his family, never pass to the trustee at all. Therefore, as between the trustee and the debtor here, I do not think that the trustee could possibly be entitled to any judgment, at any rate to the extent to which the £1,000 per annum was necessary for his maintenance, and I understand it to be the trustee's view that the £1,000 per annum is a proper allowance to make for the maintenance of the debtor and his family.

Then it is said that there may be a chance of amending the proof. It is not for me to deal with that question. I have merely to deal with the question whether, at the date of the issue of the writ, Mrs. King had a good right of action, and, as at that time the position was that the security was deemed to have been surrendered, it seems to me that there is an end of it. I must say, however, that I cannot conceive of any court giving leave to amend if it would have the effect of making the company pay twice, because the company has been paying on the footing that the security had been surrendered to the trustee, and the company had been paying this £1,000 per annum without any objection, at any rate, from the trustee, and I cannot conceive of any amendment being made which could possibly lead to the company being made to pay twice. Therefore, it seems to me that the defendants succeed.

There was one further point which I wanted to mention in connection with the public policy point. I do not think that it is inappropriate to consider the attitude of the bankruptcy law towards personal earnings. Sect. 38 of the Act *prima facie* vests all property in the trustee. *Prima*

facie, it covers all personal earnings, and yet the courts have not permitted this plain statutory enactment to interfere with the common law rule that so much of the bankrupt's personal earnings as are necessary for the maintenance of himself and his family do not pass to the trustee, on the ground of public policy. That was made quite clear again in *Re Roberts* A (13), where SIR NATHANIEL LINDLEY, M.R., said, at p. 128 :

The present Act, like previous Bankruptcy Acts, must be construed so as to enable him to do so [to live]; and the language of sect. 44, clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live.

If that is the attitude of the courts towards a plain statutory enactment B which *prima facie* covers the matter, then what is to be the attitude of the courts towards an agreement of this kind ? Can Mrs. King be permitted to say : " It may be that the trustee in bankruptcy cannot deprive you of the power to live, and cannot deprive you of this maintenance, but I can " ? That point does strengthen the grounds on which I have come C to the conclusion that the agreement was not enforceable, and the result is that, on the first ground—that is, in the change of circumstances, the public policy point—the agreement is not enforceable since and including May, and that the claim as to March and April fails on both the other grounds—that is, the fact that the creditor has elected to enforce the D whole judgment and has surrendered her security—so that there is a complete defence to the claim, and, under r. 4, if the point does afford a complete defence to the claim, and if, in the opinion of the court or a judge, the decision of such point of law substantially disposes of the whole action, the judge may dismiss the action. There will be judgment for the defend- E ants with costs.

Judgment for the defendants with costs.

Solicitors : Guilford E. Lewis (for the plaintiff) ; Richardson, Sadler & Co. (for the defendants).

F [Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

R. v. THANET AND DISTRICT ASSESSMENT AREA ASSESS-
MENT COMMITTEE AND KENT COUNTY VALUATION
G COMMITTEE, *Ex parte* ISLE OF THANET GAS LIGHT AND
COKE CO.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), April 18, 1939.]

H Rates and Rating—Valuation list—Amendment—Objection to assessments as "unfair and incorrect"—Proposed amendment by valuation committee—No grounds specified—Whether "a proposal for the amendment of the list"—"Person aggrieved"—Rating and Valuation Act, 1925 (c. 90), s. 37 (1), (2).

The Rating and Valuation Act, 1925, s. 37 (1), provides as follows : "Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness

of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list." Sect. 37 (2) provides as follows: "Every proposal made under this section must . . . specify the grounds on which the proposed amendment is supported." A county valuation committee proposed to amend the current assessments in respect of hereditaments occupied by a gas undertaking on the ground that the assessments were unfair and incorrect. The proposal contained the following words: "Amendment proposed. To such an amount as may be determined on an approved apportionment of the *cumulo* value of the undertaking having regard to the accounts relating thereto in respect of the year ended Dec. 31, 1937." The accounts had not been seen by the valuation committee. A letter from the county valuer, which accompanied the proposal, stated as follows: "Similar proposals have been made in respect of all such similar undertakings for gas, water and electricity which have not quite recently been under consideration, the intention being to investigate, in the light of the latest available accounts, how far the existing assessments require amendment." On behalf of the occupiers, it was contended that the proposal was not in compliance with sect. 37 (2) of the Act of 1925, as the grounds on which it was supported were not clearly set out:—

HELD: although a county valuation committee in a proper case could seek either a reduction or an increase of an assessment, the present proposal did not indicate whether a reduction or an increase was suggested or the nature and the *quantum* thereof, and did not, therefore, comply with the requirement of sect. 37 (2) of the Act of 1925, as it failed to specify the grounds of the proposed amendment.

EDITORIAL NOTE. This is a case of the greatest importance to ratepayers, since it decides that a proposal for an amendment of the assessment of property cannot be made upon a general inference that the value of the property must have increased or decreased. Thus where the value of an undertaking is assessed upon the profits basis, a proposal for an amendment cannot be made upon a general allegation that, by reason of an increase in prices, the profits must necessarily have increased. In such a case the proposal would have to be based upon a specific allegation that, upon accounts having been taken, the profits were shown to have been increased.

AS TO PROPOSAL FOR AMENDMENT, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484, 485, para. 913; and FOR CASES, see DIGEST, Vol. 38, pp. 582, 583, Nos. 1159-1169.]

Case referred to:

- (1) *R. v. West Norfolk Assessment Committee, Ex p. Ward* (F. B.) (1930), 94 J.P. 201; Digest Supp.

RULES *nisi* for writs of prohibition to be directed to the assessment committee for the Thanet and District Assessment Area, and to the county valuation committee for the county of Kent in order to prohibit the assessment committee and the county valuation committee from proceeding with a proposal made by the county valuation committee on Mar. 23, 1938, to amend the valuation list for the borough of Margate in respect of hereditaments occupied by the Isle of Thanet Gas Light and Coke Co., upon the grounds that the proposal was illegal and bad in law, and that the assessment committee had no jurisdiction to hear

or determine the same. The facts and the arguments are set out in the judgments.

A. M. Trustram Eve, K.C., and Arthur Capewell showed cause.

Michael E. Rowe in support of the rules.

A LORD HEWART, L.C.J. : The question involved in this matter seems to me to be a comparatively minor question, and the discussion has turned upon a comparatively minor point. The main facts are not in dispute. It is apparent from the affidavit of Mr. Coles, the county valuation officer for the county of Kent, that the undertaking conducted by the Isle of Thanet Gas Light and Coke Co. is one of a class which, for rating purposes, have for a long time been referred to as special properties. They include all electricity, gas and water undertakings. The method adopted in valuing those hereditaments is, as Mr. Coles tells us in his affidavit, to make a *cumulo* valuation of the whole of the undertaking, including the production plant, offices and the distributing mains and pipes belonging to the undertaking. He adds :

D In ascertaining what a hypothetical tenant would pay by way of rent for a hereditament as a whole, the total receipts and expenses of the undertaking are examined and the net annual value arrived at by means of a method which, in relation to gas and electricity and water undertakings, has received the sanction and approval from time to time of the courts as being the method which fairly arrives at the net annual value of the hereditaments in question.

E A little time ago, the net annual value of the hereditaments of the applicants for this rule was determined at £2,500, and, according to Mr. Coles, no alteration has been made to entries relating to the hereditaments since that date. However, he adds :

It was within my own knowledge that many new houses and other buildings had been erected within the applicant's area of supply since 1934, and on a number of occasions I had seen gas mains and pipes being laid within the area of supply.

F Then follow these statements :

G As the assessment in 1934 was based upon the actual receipts and expenses, it was not therefore based upon accounts for any period subsequent to those of the year ending Dec. 31, 1933. Since that date, I have seen reports by the directors of the applicant company for the years ending Dec. 31, 1934, 1935 and 1936. In each of these reports reference is made to the fact that the sale of gas in each year has increased in volume. In respect of 1935 the report states also that the price of gas had been reduced. . . . It is within my own knowledge that the "residuals" such as ammonia, tar, coke, etc., which are produced by such undertakings as that of the applicants have fluctuated in price since the assessment of 1934 was made.

(10) In view of the increased sales of gas the alteration in the price of gas and the alteration in the prices and quantities of the residuals, I came to the conclusion that the assessment made in 1934 could no longer be a correct or a fair assessment.

H Holding that view, the county valuation officer believed that it was his duty to make a proposal for the amendment of the valuation list, and accordingly he made a proposal for that amendment, for reasons which he has set out in his affidavit.

The question really depends upon different parts of the Rating and

Valuation Act, 1925. That statute, which provided for the establishment in every county of a committee of the county council, called the county valuation committee, undoubtedly made great changes in the law of rating. Sect. 18 provided as follows :

(2) It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this part of this Act, and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference. (3) A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this part of this Act.

It is sect. 37 of that statute which provides for the amendment of the current valuation list, and by sect. 37 (1) it is provided as follows :

Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list . . .

To pause there, it is quite clear that there can be no doubt that, in proper circumstances, the county valuation committee may make a proposal for the amendment of the list. Certain plain conditions, however, have to be fulfilled, and, in particular, the section provides that every proposal made under this section must (a) be made in writing, and, except where it is made by the rating authority, be served on the rating authority, and (b) specify the grounds on which the proposed amendment is supported.

Those being the provisions of the statute, it is complained here that in certain respects, at any rate, the steps which have been taken by and on behalf of the county valuation committee have failed to satisfy the requirements of the law. There was sent, over the hand of the county valuer, on Mar. 23, 1938, to the rating authority for the borough of Margate, a proposal for amendment of the valuation list. The county valuer by that document alleged that the county valuation committee was aggrieved by the incorrectness of the valuation list of the rating area of Margate, and made a proposal for amendment of that list in respect of the property shown in the schedule, which was property occupied by the Isle of Thanet Gas Light and Coke Co., on the ground that the existing assessments were unfair and incorrect. Those words are words manifestly taken from the Rating and Valuation Act, 1925, s. 37 (1). The person who can act under that section is a person aggrieved by the incorrectness or unfairness of any matter in the valuation list. Here the allegation in plain terms was that the present assessments are unfair and incorrect, which cannot be greatly

different from the allegation that they are incorrect and unfair. The schedule which was annexed to the proposal set out, or purported to set out, the amendment which was proposed :

Amendment proposed. To such an amount as may be determined on an approved apportionment of the *cumulo* value of the undertaking having regard to the accounts relating thereto in respect of the year ended Dec. 31, 1937.

- A The criticism which is offered in regard to that proposal is that it is not a proposal which satisfies the requirements of the statute. In form, no doubt, it is a proposal for amendment of the list, and it is a proposal on the ground that the assessments were unfair and incorrect.
- B So far, the words of the statute have been faithfully observed. When one comes to the requirements of sect. 37 (2), however, one finds the following words :

Every proposal under this section must . . . (b) specify the grounds on which the proposed amendment is supported.

- C Mr. Rowe argues, and I think that he argues with some force, that that statutory requirement presupposes, first of all, that there is an amendment clearly proposed, and, secondly, that the grounds on which it is supported are clearly set out. What is the amendment which is here proposed ? The answer is that the matter is left vague, except
- D that the county valuer says that there is a proposal that the present assessments, being unfair and incorrect, should be amended. In what sense is it said that they are unfair and incorrect ? When one looks at the grounds which apparently are the grounds purporting to specify the particular reasons for which the amendment of the list is proposed,
- E one finds the following words :

Amendment . . . To such an amount as may be determined on an approved apportionment of the *cumulo* value . . .

I desire to treat this assessment committee and the county valuation officer with complete fairness, but I find a difficulty in reading into those words anything which can fairly be called a specification of the grounds on which the proposed amendment is supported. The general nature of the amendment is indeed indicated :

Amendment on the ground that the assessments are unfair and incorrect.

- G There is no particularity as to the materials on which the unfairness or incorrectness is said to be founded. When we come to the specification of the grounds supporting the proposed amendment, what we get is not a specification of grounds, but a somewhat vague and incomplete indication of the goal to which the proposed amendment is to be directed.
- H It is directed to the goal of making an amendment which will have the effect of setting out an amount to be determined on an approved apportionment of the *cumulo* value of the undertaking. Specification is one thing, generality is another. These words seem to me, so far as they attempt the task of definition at all, to be clearly defining one thing which is unknown by reference to another thing which is also unknown.

What is the recipient of this notice to say? I pass over the fact that there is no clear indication to show whether what is aimed at is an increase or a reduction of the assessment. I was glad to hear Mr. Rowe in the course of his argument say, and say expressly, that the proposition that the county valuation committee in a proper case can seek either a reduction or an increase by any proposal which it puts forward is not challenged. What is said here is that nobody knows whether an increase or a reduction is suggested, or what are the nature and the *quantum* of the reduction or increase. Our attention has been directed in the course of the argument to *R. v. West Norfolk Assessment Committee, Ex p. Ward (F. B.)* (1). I need not reiterate the facts of that case, which have been sufficiently discussed in the course of the argument, but I do observe that SCRUTTON, L.J., in his judgment, said, at p. 202 :

One point in this case may arise as to whether a proposal for amendment which does not state what amendment is proposed, is a good proposal.

In the same case, GREER, L.J., said, at p. 203 :

It seems to me to be sufficient if his proposal says that he desires to have the list amended and states the way in which he desires to have it amended, namely, by the reduction of the total assessment without stating the amount of the reduction which he is going to ask the assessment committee to approve.

Can it fairly be said here, though, that this so-called proposal does state what amendment is proposed? I agree that it matters not whether that which is proposed translates itself into terms of reduction or into terms of increase, but who can say what it is that is proposed here? The matter seems to me to be left altogether too vague. The ground of proposal does, indeed, purport to be put forward, the ground being that the assessments are incorrect and unfair. The nature of the amendment is said to be at any rate adumbrated, but, when I look at the one set of words and the other, it seems to me that this document falls short of the requirement of the statute that every proposal must specify the grounds upon which the proposed amendment is supported.

With regard to the secondary question whether or not it is true to say that this valuation committee could, in the circumstances, be described as aggrieved, I think that no substantial difficulty arises. If there were a reduction clearly proposed, no less than if there were an increase clearly proposed, in the one set of circumstances as in the other, it seems to me that the county valuation committee, being under this Act a kind of custodian charged to attend to the uniformity of rating in a large area, might properly put forward a proposal of the one kind or the other, but it must let the person who is to pay the rate know what it is doing. It must not leave the matter vague. It must not put forward a form of words which, when it is required to specify the grounds of a proposed amendment, refrains altogether from the task of specification, or, if it appears to attempt it, attempts that task in a way which leads, not to information, but really to bewilderment and doubt.

I pass over, because it does not appear to me to be material, the question which has been raised with regard to the accounts of the particular year to which reference has been made. It is complained that the accounts for the particular year which has been named were accounts which could not, at the material time, be really available to
A the hypothetical tenant, and that they were, on any view, the accounts of only a small part of the relevant year. I think that there is no real substance in that argument. It is not suggested that those figures could be used as the basis of any calculation to be made. It might well be, in proper circumstances, that that might be an element tending
B to throw light on the solution of the problem to be solved, but, in my opinion, the case against the county valuation committee succeeds on a point which is logically prior to that—namely, the point that here it cannot really be said that there was a proposal so as to satisfy the requirement of sect. 37, and that there was not a proper specification
C of the grounds upon which the amendment was supportable. I am not troubled by the argument dependent on the word “aggrieved,” but, for the reasons which I have given, it seems to me that there is not, in the circumstances, a proper ground for the exercise of jurisdiction of this kind of tribunal under the Rating and Valuation Act, 1925. There-
D fore, the rules that writs of prohibition should issue ought to be made absolute.

HUMPHREYS, J.: I agree that the rules in this case should be made absolute, and I come to that conclusion upon the ground that
E there was here no proposal for amendment of the valuation list within the meaning of the Rating and Valuation Act, 1925, s. 37. The proposal for the amendment of the list referred to in the earlier part of the section is afterwards in the section referred to as a proposal, and, in order that there should be a proposal for the amendment of the list,
F it is provided by subsect. (2) that two requirements must be fulfilled. As to the first, no difficulty arises in this case. The proposal must be in writing, and must be served upon the proper persons. The second requirement which must be complied with in order that there should be a proposal for amendment of the list is that the grounds upon which
G the proposed amendment of the list are to be supported must be mentioned. When I look at this document which is called a proposal for the amendment of the list, I find that it gives no information at all as to the answer to the question which would naturally be put by a person to whom such a document was addressed: “What is your
H proposed amendment?” It appears to me that the answer is as follows: “We are not going to tell you, for the very good reason that we do not know, but we maintain that some amendment is desirable.” In my view, that is quite contrary to the requirement of sect. 37 (2) (b), and is contrary to the plain meaning and the whole intention of this statute. This proposal for amendment of the valuation list

is the basis of the whole machinery of the Act. There can be no reference of any such question to the assessment committee unless there is a proposal for the amendment of the list in the first instance. It is vital, therefore, that there should be a proposal which is something more than a statement in the terms of the Act: "I propose that the list should be amended." I think it really becomes quite clear that something more was intended when one finds that the person who is proposing that there should be such an amendment has to state that he is aggrieved. That seems to me to involve at least that he must have some idea whether the result of the proposed amendment will be to increase or to decrease the liability of the rated occupier. Not only that, but the grounds are to be stated so that the person who is to be affected by the notice is to be made aware of the grounds upon which the proposed amendment is supported. How can it be said that the grounds of the proposed amendment are to be supported upon any known basis when the proposed amendment itself is left, as LORD HEWART, L.C.J., has said, quite vague and unstated? I should be very sorry to say anything which would put difficulties in the way of that extremely important body whose duties are of the greatest possible public importance—namely, the county valuation committee created by sect. 18 of the Act—but it is to be observed that sect. 37, the governing section in this matter, includes, not only a county valuation committee, but also any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list. It seems to me quite impossible to say that there is to be one law for the county valuation committee when they are making a proposal and a different law for any other person who is equally entitled to make a proposal. On that ground—I say nothing whatever on the other matters which have been argued in this case—I agree that the rules should be made absolute.

SINGLETON, J.: I am of the same opinion. The proposal does not show what amendment it is proposed to make. In *R. v. West Norfolk Assessment Committee, Ex p. Ward (F. B.)* (1), it was decided in the Court of Appeal that it was not necessary, in a proposal, for the proposer to state the precise figure to which he desired the valuation reduced. It is clear from the judgments of SCRUTTON and GREER, L.JJ., to which LORD HEWART, L.C.J., has referred, that at least the nature of the amendment must be indicated. In the case with which we have to deal, the proposal was a proposal on the ground that the present assessments are unfair and incorrect, and at the foot of it there appeared the following words:

Amendment proposed. To such an amount as may be determined on an approved apportionment of the *cumulo* value of the undertaking having regard to the accounts relating thereto in respect of the year ended Dec. 31, 1937.

The county valuation committee who put forward the so-called proposal had not seen those accounts, and had not had them before them at all.

They were therefore in no position to know from the accounts themselves what the accounts would or did disclose. They had only quite recently come into existence. With the proposal there was sent a letter of the same date—namely, Mar. 23, 1938—from the county valuer which contained the following paragraph :

A

Similar proposals have been made in respect of all such similar undertakings for gas, water and electricity which have not quite recently been under consideration, the intention being to investigate, in the light of the latest available accounts, how far the existing assessments require amendment.

- I think that that paragraph shows that there is much to be said for the
- B argument put forward on behalf of the occupiers that this was really something of an exploratory or fishing character, rather than a proposal properly so called. No one questions the right of the county valuation committee to make a proposal, or questions that a proposal made by it might be for either an increase or a reduction of the assessment,
- C but, if and when the county valuation committee does put forward a proposal, that proposal must be in accordance with the terms of the Rating and Valuation Act, 1925, s. 37. For myself, I am not satisfied that the county valuation committee is aggrieved within the meaning of this section. It seeks to base its proposal, as is shown by its letter, on
- D accounts which it had not seen, and which might justify an increase or might justify a reduction in the assessment, or which, for all it knew at that time, might justify neither. For that reason, I confess that I had considerable doubt as to whether it can be said to be a party or person aggrieved within the meaning of sect. 37 of the Act, but, whether or
- E not that is so, the proposal must comply in particular with sect. 37 (2), and, if it is based, as it is said to be in this case, on incorrectness or unfairness, it must specify the grounds on which the proposed amendment is supported. This proposal, as it is called, does neither, and, in my view, it was not a proposal within the meaning of sect. 37 of the Act.
- F No doubt the county valuation committee could have made a proposal for an increase, if it had so desired, on the basis of the 1936 accounts, or on the suggestion that there had been an increase in the pipes or mains, or in the receipts or profits, but it did not do so. It sought to base this on the 1937 accounts in the vaguest possible way, so that the
- G occupier could not know, or be expected to know, that which he had to meet. In my view, it would be placing an undue burden on occupiers of property of this kind generally if they had to have valuations made merely on receipt of a document of this kind, which, as I have already said, is not a proposal within the terms of the section.
- H In view of what has been said, I do not think that it is necessary to consider the question raised in the seventh ground, in the affidavit of Mr. Stickels, to the effect that :

... in so far as the proposal states that the amendment desired is dependent upon the accounts for the year ended Dec. 31, 1937, it is illegal inasmuch as such accounts were not and could not have been available to the hypothetical tenant on Apr. 1, 1937, as from which date the said proposal would take effect.

No good purpose would be served by considering questions as to when those accounts might be relevant. It is obvious that on some occasions, in certain circumstances, they might become relevant, but at the same time it is difficult to see that they can properly be made the basis of an assessment which would operate as from Apr. 1, 1937. According to the proposal in this case, they are sought to be made the basis, and are the only ground which is mentioned at all, because the amendment proposed is as follows :

To such an amount as may be determined on an approved apportionment of the *cumulo* value of the undertaking having regard to the accounts relating thereto in respect of the year ended Dec. 31, 1937.

In certain circumstances, that might be an element. More than that, it is difficult to say. I agree that the rules should be made absolute.

Rules made absolute, with costs.

Solicitors : *Sharpe, Pritchard & Co.* (showing cause) ; *Hargreaves & Crowthers* (in support of the rules).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

OATES v. EARL FITZWILLIAM'S COLLIERIES CO.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and du Parcq, L.JJ.), **March 30, April 5, 1939.**]

Workmen's Compensation—Death due to disease—Heart disease—Whether death accelerated by work—Evidence of physiological injury or change due to work.

A workman, suffering from disease of the heart, became seriously ill while at his work and died shortly afterwards. The county court judge refused to make an award in favour of his widow, on the ground that she had failed to establish that personal injury had been caused to the workman by accident arising out of and in the course of his employment. There was no finding of fact that the workman's death was due to the progress of the disease or that the man's work accelerated the death :—

HELD : although there was no evidence of any strain or similar cause other than that arising out of the man's ordinary work, the death or injury might be due to an accident arising out of his employment. It was essential that there should be evidence of a physiological injury or change occurring in the course of a man's employment by reason of the work on which he was engaged at or about the time of his death.

[EDITORIAL NOTE.] It is always a difficult question to decide whether death is due to the disease or to the disease and some extra exertion of the workman in the course of his work. It has been said that the arbitrator ought to consider whether death would have ensued at the time at which it did by reason of the disease alone. In these cases, where the man has been actually at work almost up to the moment of his death, this is a very difficult question of fact, and it has been thought that it was necessary to find some extra exertion or strain to which the death could be attributed. The Court of Appeal here reiterate that the proof of extra exertion or strain is not essential for the recovery of compensation, but that there must be evidence of a physiological injury or change due to the work upon which the workman was engaged at or about the moment of his death.

AS TO ACCELERATION OF DISEASE BY ACCIDENT, see DIGEST, Vol. 34, pp. 333, 334, Nos. 2707-2714; and see WILLIS'S WORKMEN'S COMPENSATION, 31st Edition, pp. 18, 19.]

Cases referred to :

- A (1) *Ormond v. Holmes & Co., Ltd.*, [1937] 2 All E.R. 795; Digest Supp.; 157 L.T. 56; 30 B.W.C.C. 254.
- (2) *McFarlane v. Hutton Brothers (Stevedores), Ltd.* (1926), 96 L.J.K.B. 357; Digest Supp.; 136 L.T. 547; 20 B.W.C.C. 222.
- (3) *Walker v. Brown (John) & Co., Ltd.* (1932), 25 B.W.C.C. 166; Digest Supp.
- (4) *Partridge Jones & John Paton, Ltd. v. James*, [1933] A.C. 501; Digest Supp.; 102 L.J.K.B. 760; 148 L.T. 553; 26 B.W.C.C. 277.
- B (5) *Whittle v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1936] 2 All E.R. 1221; Digest Supp.; 29 B.W.C.C. 179.
- (6) *Miller v. Carnitine Steel Castings Co., Ltd.*, [1935] S.C. 20; Digest Supp.; 27 B.W.C.C. Supp. 101.
- (7) *Moore v. Tredegar Iron & Coal Co., Ltd.* (1938), 31 B.W.C.C. 359.
- (8) *Barnabas v. Bersham Colliery Co.* (1910), 103 L.T. 513; 34 Digest 325, 2656; 4 B.W.C.C. 119.
- C (9) *Muscroft v. Stewarts & Lloyds, Ltd.* (1928), 140 L.T. 64; Digest Supp.; 21 B.W.C.C. 274.

APPEAL by the applicant from an award of His Honour JUDGE ESSENHIGH, at Rotherham County Court, dated Nov. 29, 1938. The applicant was the widow of a man who suffered from heart disease. On the day of his death, the workman did 3 hours' hard work and then had a severe attack, dying a few hours later. The county court judge found that the applicant was not entitled to compensation, because there was no evidence on which he could say that there had been an accident.

John Neal and Clive Salter for the appellant.

D. P. Maxwell Fyfe, K.C., and G. Sutton-Nelthorpe for the respondent company.

Neal: The judgment cannot possibly stand, in view of the evidence.

F The judge says that he can find no evidence on which he can say that there was an accident. The doctor, in his evidence, said that he thought that the work contributed to the death. The judge was clearly wrong in law in saying that there was not sufficient evidence on which he could find that there was an accident. The judge was directing his mind to the question of whether or not there had been some strain or whether or not something particular had happened on the day of the man's death. There was a new rupture that day, or else the old perforation was aggravated by the exertion. In *McFarlane v. Hutton Brothers (Stevedores), Ltd.* (2), it was held that it is not necessary to find that there was any special strain, and that accordingly an award should be made in favour of the dependants. It is an accidental injury within the meaning of the Workmen's Compensation Act if a man sustains a physiological injury. The judge has failed to recognise that a physiological injury caused by heavy work is an accident. *Ormond v. Holmes & Co., Ltd.* (1), cited at the hearing on behalf of the respondent company,

was misunderstood by the judge. In *Moore v. Tredegar Iron & Coal Co., Ltd.* (7), it was held that the county court judge had misdirected himself by limiting his inquiries to something special or abnormal in the workman's work, and that, as the death had been accelerated by the man's normal work on the night in question, there must be an award in favour of the widow. [Counsel referred to *Partridge Jones & John Paton, Ltd. v. James* (4).] A

Fyfe, K.C.: The statement of claim stated that the rupture of the aortic valve was caused, or contributed to, by the work done by the man on Sept. 5. That was the point which the county court judge had before him, and on that point the judge was clearly against the plaintiff. B I should not ask the court to exclude a matter of justice on a question of pleading. The issue which is before the court now was not before the county court judge on the pleadings as they were then framed. There are two lines of cases—namely *Barnabas v. Bersham Colliery Co.* (8), and *Muscroft v. Stewarts & Lloyds, Ltd.* (9) and *James's* case (4). The two C lines of cases met in *Whittle v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (5), and are said to be incompatible. In *Miller v. Carntyne Steel Castings Co., Ltd.* (6), it was held that it is necessary to find something more than that a disease is the cause of death. Where there is progressive disease, it is not enough to say that a man's work makes his condition D worse. There must be some particular event, either external or internal, to justify the finding that there has been an accident. In *Ormond v. Holmes & Co., Ltd.* (1), there is a review of the authorities. If a man has a disease which is likely to be affected by his work, it is not sufficient, in order to bring the matter within the Act, to show that the work reduces E the power of the workman. It is necessary to show that there is a change in the physiological condition of the workman amounting to an accident, or that there is some external event. Either the county court judge has applied his mind correctly or else we do not know whether or not he put the question to himself. It would be wrong to take the F view that he had the facts in his mind and refused to apply them. If the court takes the second view, the matter must go back to the county court.

CLAUSON, L.J. [delivering the judgment of the court]: This is an appeal from a decision of the judge of the Rotherham County Court, G refusing to make an award in favour of a workman's widow, on the ground that she had failed to establish that in the workman's employment personal injury by accident arising out of and in the course of the employment had been caused to the workman. The workman died on Sept. 5, 1938. The particulars of claim as to the accident and cause of injury H were stated in the following terms:

Sept. 5, 1938. New Stubbin Colliery. Parkgate Seam. The deceased was engaged on this date in arduous work at the coal face. Rupture of the aortic valve of the heart caused by or contributed to by the said work.

The deceased was a collier, 40 years of age, with a diseased heart.

Prior to Sept. 5, he had suffered pain from time to time, apparently due to this condition of the heart. On Sept. 5, he started work about 6 a.m. and worked on his ordinary work using the pick. About 9 a.m. he complained of pain, and stopped work and went home, where he died soon after 11 a.m. The medical evidence for the widow was to the effect

A that the death was due to sudden rupture of the aortic cusp, and that this rupture took place at or just before the time when he found himself forced to stop work. The defendants' medical evidence was to the effect that the rupture may have taken place 3 or 4 weeks before the death. The evidence having been completed, counsel for the defendants

B referred to *Ormond v. Holmes & Co., Ltd.* (1), and appears to have suggested that it was a case in which disease was merely accelerated by work, and that there was no sufficient evidence of an injury by accident arising out of and in the course of the man's employment. Counsel for the plaintiff in reply referred to *McFarlane v. Hutton Brothers (Stevedores), Ltd.* (2), *Walker v. Brown (John) & Co., Ltd.* (3), *Partridge Jones & John Paton, Ltd. v. James* (4) and *Whittle v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (5). We have not the advantage of having any judgment in writing from the county court judge, but it appears from the notes made by

C the defendants' medical witnesses, and held that the rupture of the aortic cusp had taken place some 3 weeks before death. The judge seems to have been impressed by the fact that there was, to use his own words, "no evidence to say that something particular had happened" on the day on which the man found himself forced to stop work and died.

D He seems to have held that the plaintiff had not discharged the onus of proving injury by accident arising out of and in the course of the employment, and, indeed, that there was no evidence at all on which he could say that there had been an accident.

The widow appealed to this court. Her counsel in arguing before us

F was bound to accept the finding of the county court judge that the rupture of the aortic cusp which the widow's medical evidence had sought to say had taken place on the day of death had occurred 3 weeks or so earlier. He argued, however, that, on the evidence, there was no escape from the conclusion that physiological injury or change occurred at or about the

G moment when the man found himself forced to stop work, and, accordingly, in the course of the man's employment, and he sought to establish, by reference to certain language used by Dr. Naish (the employers' medical witness, whose evidence was accepted by the judge), to the effect that the man's work that day had had some effect on the progression of the heart

H disease, that this physiological injury or change must be taken to have arisen out of the man's employment. He accordingly contended in the first instance that the only course open to this court was to make an award in the appellant's favour. We may say at once that, even if we were prepared to accept the first part of this submission, we should not feel able to hold that the medical evidence as it stands necessarily

establishes that the work which the man did on the day of his death contributed in a material degree to the occurrence of the physiological injury or change suggested on the widow's behalf. Accordingly, we cannot ourselves make an award in favour of the widow. The question remains, however, whether or not the judge's decision refusing an award can stand. For the widow, it was suggested that the judge's decision A was based on the view that the widow has to point to specific injury arising from some specific act, and, indeed, the insistence at the trial on the importance of the question whether the rupture of the aortic cusp occurred (as the widow in her particulars claimed) on the day of death or, as the judge found, 3 weeks earlier does lend some colour B to the suggestion that the case was being dealt with as if it turned necessarily on the question whether or not a specific injury arising from some specific act could be shown to have taken place. In our judgment, it is clear since the decision of the House of Lords in *Partridge Jones & John Paton, Ltd. v. James* (4) that such a method of dealing with the C case would be erroneous, and, if it was in fact so dealt with, the decision cannot stand. We do not, however, think it clear that the judge intended so to deal with the case. We think that such material as we have before us as to the grounds of his decision is consistent with the possibility D that he refused an award on the ground that he thought that the man's collapse was solely due to the progress of the disease, and that the man would have died whether or not he had been at work on that day. However, he did not so find, and, in view of the evidence of Dr. Naish (which the judge says that he accepted) that the man's exertions at his E work on the day of his death must have had a serious effect on him, it is impossible for us, in the absence of a clear finding of fact, to deal with the case on the footing that the man's work did not contribute in a material degree to the condition which caused him to stop work on the day of his death. For these reasons, we find it necessary that the matter F should be remitted for a fresh hearing, and we so order. However, it is convenient, we think, to make certain observations for the assistance of the tribunal upon the fresh hearing.

In our judgment, a physiological injury or change occurring in the course of a man's employment, by reason of the work in which he is engaged at or about that moment is an injury by accident arising out of G his employment, and this is so even though the injury or change be occasioned partly, or even mainly, by the progress or development of an existing disease if the work he is doing at or about the moment of the occurrence of the physiological injury or change contributes in any material degree to its occurrence. Moreover, this is none the less true H though there may be no evidence of any strain or similar cause other than that arising out of the man's ordinary work. This appears to us to be the result of the decision of the House of Lords in *James's* case (4), as expounded in the opinion of LORD BUCKMASTER. The applicant in *Ormond v. Holmes & Co., Ltd.* (1) failed because the stroke

which was the injury or accident on which he based his claim was found neither to have been caused, nor to have been contributed to, nor to have been accelerated, by the work in which he was engaged when it occurred. In *Miller v. Carntyne Steel Castings Co., Ltd.* (6), the workman would have succeeded if he had collapsed during his work under the strain of his work, A but he failed because his incapacity was found to be due solely to the progress of his disease, and there was no evidence of a physiological injury or change occurring at any particular moment under the stress of the work on which he was engaged at or about that moment.

The costs of the hearing before the Rotherham County Court will be B dealt with by His Honour JUDGE HILDYARD, at Doncaster, who is to rehear the application. The costs of this appeal must be paid by the respondent employers.

Solicitors : *Corbin, Greener & Cook*, agents for *Raley & Sons*, Barnsley (for the appellant); *Hosking & Berkeley*, agents for *Gichard & Co.*, C Rotherham (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

D LAWRENCE AND OTHERS v. SOUTH COUNTY FREEHOLDS, LTD. AND OTHERS.

[CHANCERY DIVISION (Simonds, J.), March 10, 21, 22, 23, 24, April 20, 1939.]

E *Sale of Land—Restrictive covenants—Building scheme—Community of interests—Reciprocity of obligation—Estate laid out in lots—Division into sublots—Action by purchaser of one sublot against another.*

In May, 1843, B. conveyed to W. a plot of land without buildings, which W. proceeded to develop. There was no evidence of the circumstances in which development took place, nor as to why it took place. In 1844, a substantial part of the south-western corner of the plot was sold by W. to V. and C., W. covenanting that the trade of a tavern-keeper or hotel-keeper or inn-keeper or beershop-keeper should not at any time thereafter be carried on on the residue of the land originally bought from B. W.'s plan was to form a crescent of houses of uniform design, with the usual gardens and lawns, and to exact from the several purchasers or lessees similar covenants restricting their user. In Dec., 1844, W. granted a building lease of part of the land to S., S. agreeing to build 2 houses of a value of at least £600 each and not to build at the back of the land any dwelling-house of less value than £250. S. further agreed that any building which should at any time be erected on the land should not be used for public livery stables or for cowsheds or as a public-house or beershop, and also covenanted not to carry on or permit to be carried on upon the premises or any part thereof any trade or business whatsoever excepting only that of a school or seminary, surgeon or apothecary. The lease contained an option of purchase imposing on the purchaser an obligation to enter into similar covenants with the vendor. By the same lease, W. agreed for himself, his heirs and assigns that, for the purpose of building and completing the crescent in conformity with the plan, and maintaining its uniformity and regularity when completed, and ensuring uniformity in the other houses to be erected, a similar deed of covenant should be entered into with

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every purchaser on every purchase. In Aug., 1844, W. agreed with P. to sell part of the crescent, P. agreeing to execute a deed of covenant to run with the land and bind P. and all future owners and occupiers, so far as the rules of law or equity would allow. It was agreed that the deed of covenant should contain covenants by P. not to erect on the land buildings other than messuages or dwelling-houses to the value of £600 each at least, and such buildings should range in a line with the other messuages to be erected in the crescent. There was also a covenant that no trade or business (except only that of a school or seminary, surgeon or apothecary) should be carried on upon the land, and that the messuages or houses should not be used other than as private dwelling-houses or lodging-houses. W. entered into a number of conveyances of parts of the crescent to other purchasers, and in some cases represented that there would be similar restrictions affecting all the land in the crescent, and bound himself that there would be such restrictions. There was no evidence of any plan showing the whole area and the way in which it was lotted, and everything pointed to the areas being the subject of individual bargaining in each case. Both the plaintiffs and the first defendants devised title through P. Under his conveyance of July, 1845, P. was bound to erect 3 houses on his plot. He erected these and sold them to purchasers, all of whom had notice of W.'s conveyance to P. and of the deed of covenant and of W.'s covenant with regard to maintaining uniformity. The defendants, who derived title from one of these purchasers, let the premises to a school of music :—

HELD : (i) the word "school" bears its primary and natural meaning of a place where boys or girls receive instruction and discipline, and the addition of further words of description such as "of music" or "of dancing" indicates that that ordinary meaning is being qualified or extended.

(ii) there was no building scheme, because (a) though the plaintiffs and defendants derived title through a common vendor, the vendor had not laid out his estate, or a defined portion thereof, in lots subject to restrictions imposed on all lots, and consistent only with some general scheme of development, as laid down in *Elliston v. Reacher* (1), (b) the vendor could not have intended the restrictions to be for the benefit of all the lots sold, as he took separate covenants from each purchaser, so that the purchasers were not brought into legal relationship with each other, nor had the restrictive covenants been vested in the vendor or third parties as trustees for all persons from time to time becoming entitled to the separate lots, and (c) the lots were not purchased on the footing that the restrictions were to enure for the benefit of the purchasers of the other lots, as the lots and purchasers were unnumbered and unknown.

(iii) where the purchaser of an original lot subdivides it and disposes of the sublots without imposing any new burdens but in such manner that the purchasers have notice of the old ones, "community of interest" requires "reciprocity of obligation" and the subpurchasers are bound *inter se* by the restrictions, provided always there was a building scheme in respect of the whole land.

[EDITORIAL NOTE.] The main features of a building scheme are now well settled, and they are (i) derivation of title from a common vendor, (ii) a defined area intended to be sold in lots and to be subject to restrictions framed upon a general plan of development, (iii) an intention by the vendor that the restrictions shall be for the benefit of all the lots, and (iv) an intention on the part of the original purchasers to take the benefit of the restrictions. These essentials are set out in *Elliston v. Reacher* (1), a case which was decided in 1908, but they can be traced in earlier cases going back to 1880. The first hint of the doctrine, we are told in the judgment herein, is to be found in *Western v. MacDermott* (5) in 1865, but the laying out of the estate and the entering into of the covenants in the present case took place

in or about the year 1843. The law relating to building schemes has, therefore, been considered and discussed with reference to conveyances made long before the above principles were developed. The facts of this case, so far as such facts can be, are fairly typical of the problem which usually confronts conveyancers dealing with a case of this kind. The development of an estate is often haphazard, and, even where it is based upon a definite and preconceived plan, such plan is more often

A than not subject to variation as the development progresses. This case goes on to consider the position of a subsidiary scheme, that is, where part of the land originally sold is itself said to be subject to a building scheme. Two points of particular interest are made upon this. The first is that there can be no subsidiary building scheme unless there is a principal building scheme—that is to say that, if there is a failure to prove the principal building scheme, there can be no subsidiary scheme. The second is that, in order that the subpurchasers from the sub-

B vendor shall be bound by, and shall be able to enforce, the covenants *inter se*, it is only necessary that they shall purchase with notice of the restrictions upon the whole estate. By reason of a purchase with notice, there is created that “community of interest” which imports “reciprocity of obligation.”

AS TO BUILDING SCHEMES, see HALSBURY, Hailsham Edn., Vol. 29, pp. 447-449, para. 656; and FOR CASES, see DIGEST, Vol. 40, pp. 307-310, Nos. 2627-2647.]

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Cases referred to :

- (1) *Elliston v. Reacher*, [1908] 2 Ch. 665; 40 Digest 309, 2646; 78 L.J.Ch. 87; 99 L.T. 701; *affg.*, [1908] 2 Ch. 374.
 - D (2) *Reid v. Bickerstaff*, [1909] 2 Ch. 305; 40 Digest 312, 2665; 78 L.J.Ch. 753; 100 L.T. 952.
 - (3) *Kelly v. Barrett*, [1924] 2 Ch. 379; 40 Digest 303, 2606; 94 L.J.Ch. 1; 132 L.T. 117.
 - (4) *Osborne v. Bradley*, [1903] 2 Ch. 446; 40 Digest 329, 2780; 73 L.J.Ch. 49; 89 L.T. 11.
 - E (5) *Western v. MacDermott* (1866), 2 Ch. App. 72; 40 Digest 328, 2769; 36 L.J.Ch. 76; 15 L.T. 641; *affg.* (1866) L.R. 1 Eq. 499.
 - (6) *Schreiber v. Creed* (1839), 10 Sim. 9.
 - (7) *Spicer v. Martin* (1888), 14 App. Cas. 12; 40 Digest 308, 2641; 58 L.J.Ch. 309; 60 L.T. 546; *affg. on other grounds* (1886), 34 Ch.D. 1.
 - (8) *King v. Dickeson* (1889), 40 Ch.D. 596; 40 Digest 321, 2719; 58 L.J.Ch. 464; 60 L.T. 785.
 - F (9) *Knight v. Simmonds*, [1896] 2 Ch. 294; 40 Digest 329, 2779; 65 L.J.Ch. 583; 74 L.T. 563; *affg.*, [1896] 1 Ch. 653.
 - (10) *Rogers v. Hosegood*, [1900] 2 Ch. 388; 40 Digest 312, 2664; 69 L.J.Ch. 652; 83 L.T. 186.
 - (11) *Renals v. Cowlishaw* (1879), 11 Ch.D. 866; 40 Digest 316, 2686; 48 L.J.Ch. 830; 41 L.T. 116; *affg.* (1878), 9 Ch.D. 125.
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ACTION for injunction restraining the first defendants from carrying on at No. 13, Montpelier Crescent, Brighton, the business of teachers of music and dancing or any trade or business whatsoever (excepting only that of a school or seminary, surgeon or apothecary), or from using or

H permitting the premises to be used otherwise than as a private dwelling-house or lodging-house (except for the purposes aforesaid) in breach of covenants contained in a deed of covenant dated July 3, 1845, and made between John Packham, of the one part, and Thomas Wisden, of the other part, and against the first defendants for permitting the same to be so used.

The second and third defendants had been the occupiers of the property, but their tenancy had been determined at the date of the hearing. Against these defendants the plaintiffs claimed an injunction to restrain them from carrying on upon the premises the business of teachers of music and dancing, and the judge granted relief against them. The action proceeded against the first defendants. The facts are fully set A
out in the judgment.

F. R. Evershed, K.C., and *Raymond Jennings* for the plaintiffs.

Alexander Grant, K.C., and *Roger W. Turnbull* for the defendants.

SIMONDS, J.: The plaintiffs, Frederick Geoffrey Lawrence and B
Edmund Roy Lawrence, as legal personal representatives of their mother, Lilian Kate Lawrence, who died on Apr. 2, 1936, are the owners in fee simple of a messuage known as No. 14, Montpelier Crescent, and situate at Brighton, in the county of Sussex, and they are, with their brother, the third plaintiff, Tudor North Lawrence, beneficially entitled to the C
messuage, of which they have been in possession and occupation since the death of their mother.

The first defendants, South County Freeholds, Ltd., are the owners in fee simple of a messuage immediately adjoining the plaintiffs' messuage, and known as No. 13, Montpelier Crescent, of which the second and D
third defendants, the Montpelier School of Music and Mary Elsie Darley, were, at the time of the issue of the writ, tenants or sub-tenants and occupiers. Against the second and third defendants the plaintiffs claimed an injunction to restrain them from carrying on upon these premises the business of teachers of music and dancing in such manner E
as to cause a nuisance to the plaintiffs as occupiers of No. 14. I have held that in this respect their claim was well founded, and have granted the appropriate relief. It was unnecessary to grant an injunction, as, upon the hearing, their tenancy of No. 13 had been determined. It remains to consider the position as between the plaintiffs and the first F
defendants, to whom I will hereafter refer as the defendants. Against them, the plaintiffs claim an injunction to restrain them from carrying on or from suffering to be carried on upon No. 13 the business of teachers of music and dancing, or the business of letting out rooms therein for the purpose of music and dancing being taught or practised thereat, or G
for certain other purposes, or for any trade or business whatsoever (excepting only that of a school or seminary, surgeon or apothecary), or from using the premises or permitting the same to be used other than as a private dwelling-house or lodging-house (except for the purposes aforesaid) in breach of certain covenants contained in a deed of covenant dated H
July 31, 1845, and made between John Packham, of the one part, and Thomas Wisden, of the other part.

To succeed in their claim, the plaintiffs must establish (i) that the premises No. 13 have been so used as to contravene the covenants in question, (ii) that the defendants have themselves so used, or suffered

such user of, the premises, (iii) that the defendants are bound by the covenants, and (iv) that the plaintiffs are entitled to sue upon the covenants.

It will serve to narrow the issues to some extent if I deal first with the second point. The defendants have not themselves used the premises
 A in such a way as to commit a breach of covenant. The only question is whether they have suffered such user. Having considered the documentary evidence and heard the oral evidence of the defendant Mrs. Darley and of Mr. Bailey, the defendants' representative and agent, I am satisfied that the defendants did not at any time suffer the user
 B of the premises for any purpose other than that of a school of music, whatever that may involve. They were in fact used for dancing lessons and other purposes which could not, in my judgment, be assumed to be covered by the expression "school of music," but I hold, upon the facts, that the defendants neither knowingly let them for any other
 C purpose than a school of music nor subsequently refrained from taking any steps which they could or ought to have taken to stop such user. Accordingly, they did not suffer the user of the premises for any other purpose than that of a school of music. That they did let the premises knowing that they were to be used for a school of music they them-
 D selves admit, and they must accordingly admit that, if such user is prohibited by the covenant, they have been guilty of a breach.

The first question then resolves itself into one which can be stated shortly—namely, whether or not the carrying on of a school of music upon the premises is the carrying on of any "trade or business whatsoever excepting only that of a school or seminary, surgeon or apothecary," or, more shortly, whether or not the carrying on of a school of music is the carrying on of a school within the meaning of this covenant. The plaintiffs contend that, in its context, the word "school" has
 E what I have little doubt is its primary and natural meaning—namely, a place where boys or girls receive instruction and discipline. That is
 F the meaning which it bears in its most familiar compounds—schoolboy, schoolgirl, schoolmaster. On the other hand, it is urged that, so long as an institution is called a school, then it is a school within the covenant. It is immaterial what addition is made to the title, what is the subject-
 G matter which is taught, or what the age or condition of the pupils. A school is a school, whether it is a school of music, of dancing, of motoring or of musketry. Between those contentions I have no hesitation in adopting that of the plaintiffs. Not much help is to be got from the context, though there is some ground for thinking that, in a document of the first
 H half of last century, the word "seminary" may, in the collocation of "school or seminary," have been intended to mean a school for girls, "school" being confined to school for boys. I do not, however, rest my decision upon this, but rather upon what appears to me to be the ordinary meaning of the word, and upon the fact that the addition of the word "school" or further words of description—"of music," "of

dancing," or as the case may be—indicates that that ordinary meaning is being qualified or extended in some way. There appears to me to be no sufficient reason for admitting any such qualification or extension in what are, after all, words of exception, and, therefore, words which must be strictly construed.

Upon the first two points, then, I am of opinion that the defendants A have committed a breach of the restrictive covenant by suffering the user of No. 13, Montpelier Crescent, as a school of music. Upon the third point, there is no difficulty. The defendants do not question that they are bound by the restrictive covenant, subject always to the question of who can sue them upon it. Upon the fourth point—namely, whether B the plaintiffs are entitled to sue the defendants upon the covenants in question—it will be necessary to examine in detail the circumstances in which they were entered into. At the outset, it may be said that two questions will be found to be involved, (i) the now familiar question whether the plaintiffs' and the defendants' premises were comprised in C what is called, in a technical and special sense, a building scheme, and (ii) whether, assuming that question to be decided in their favour, the plaintiffs can, in the special circumstances of this case, sue the defendants upon the covenants.

It is now nearly 100 years since the transactions which I have to investi- D gate took place. It is not surprising that some documents which might be material are not to be found, and that some facts which it is important to prove are left to conjecture. The story begins on May 17, 1843. On that day Thomas Budgen conveyed to Thomas Wisden (together with other lands) a plot of land at Brighton measuring 6 acres, 2 roods, E 37 perches, and, as appears from the plan annexed to the conveyance, bounded on the north by Montpelier Road, on the east by Dyke Road, on the south by a new road from the railway station, and on the west by the road to Blatchington, afterwards called Clifton Hill. The plot was of an irregular shape, being some 870 ft. long on its north side and F narrowing to 566 ft. on its south side. There were then no buildings upon it. It was this plot that Wisden forthwith proceeded to develop. but it is part, and part only, of it which the plaintiff claims to be comprised in a building scheme. It is unfortunate that, owing to the lapse of time and loss of documents, there is no evidence of the circumstances in G which the development took place. The plaintiffs have not been able to prove that there was any office where intending purchasers could see a plan of the estate, nor—though, as will presently appear, there was some kind of ground plan—that there was a plan which indicated the several lots plotted out, with a statement showing which lots would be H subject to what restrictions. Nor, though I can now see how in fact the whole area was developed, have I any information why it was so developed. Nothing appears on the documents to explain the curious irregularity of the areas subject to different covenants, nor have I any information about a substantial part of the area originally purchased—

namely, the south-western corner of it facing on Station Road and Clifton Hill—except that as early as Apr. 20, 1844, part of it was sold by Wisden to Edmund Vallance and William Catt, the purchasers binding themselves by no restrictions, but the vendor entering into a covenant that the trade, business or calling of a tavern-keeper or hotel-keeper or inn-keeper or beershop-keeper should not at any time thereafter be carried on in any messuage, tenement or building then erecting or which might be erected on the residue of the land therein described, meaning thereby the residue of the land originally purchased from Budgen. The plaintiffs, however, if I understand their contention, excluded this south-western area, if I may so call it, from their scheme. At one time I thought that they wished also to exclude from it the parts of any plot itself fronting on Montpelier Crescent which abutted on Dyke Road or Station Road and were subject to different restrictive covenants. However, if there was a scheme, I see no ground for such exclusion.

It is, as I have said, easy to see how the area was in fact developed. Reference may be made, first, to the plan annexed to the conveyance of May 6, 1844 (Wisden to Childens and Cheesman), secondly, to the ordnance survey, 1875 edition, and, thirdly, to a plan prepared by the plaintiffs for the purpose of these proceedings which shows conveniently the layout of Montpelier Crescent, with different colours showing the areas of the several plots which were subject to different covenants, the area which I have called the south-western area being left uncoloured. From these, and from other plans on the documents, and from the documents themselves, I am left in no doubt that from the outset it was Wisden's plan to form a crescent of houses of more or less uniform design, with the usual gardens or lawns between the houses and Montpelier Road, and to exact from the several purchasers or lessees similar covenants restricting their user. Having, as I have already stated, purchased the property in May, 1843, on Dec. 12, 1843, he entered into an agreement with one Richard Stone to which reference must be made because it is much relied on by the plaintiffs. That agreement recites Wisden's seisin of :

... a piece of land near the Montpelier Road in Brighton aforesaid on which it is intended to form a crescent to be called Montpelier Crescent in the form and manner particularly set forth on a ground plan thereof which is identified with the signatures of the parties hereto respectively.

It recites that Wisden has agreed to grant to Stone a lease of the piece of ground distinguished by the name "Richard Stone" on the ground plan, and containing in width in the front and next the foot pavement 62 ft., or thereabouts, and so on. Then Stone agrees to build on that plot two messuages, spending on each £600 at least, with regulations as to building line and such matters, and Wisden agrees, upon the completion of the buildings, to grant him a lease of the messuages so built, together with the use, in common with other persons to whom he may grant the use thereof, of the lawns and pleasure ground in front of the

houses. Then it is agreed that every such lease shall contain covenants by Stone for repair, insurance, payment of a contribution to the expense of making the lawn and pleasure ground, and the observance of the building line. Then there is a covenant (which is, I think, of some importance) not to build upon the ground at the back of the messuages to be built and between them and the Dyke Road any dwelling-house of less value than £250, and it is agreed that any building which should at any time be erected on the ground should not be used for public livery stables or for cowsheds or as a public-house or beershop. Then there is a covenant (which is similar to that upon which the plaintiffs sue) not to carry on, or permit to be carried on, upon the premises by such lease demised, or upon any part thereof, any trade or business whatsoever, excepting only that of a school or seminary, surgeon or apothecary. It was further agreed that the lease should contain an option for purchase as therein mentioned, and that, in the event of purchase, the purchaser should enter into a deed of covenant with the vendor which should contain (*inter alia*) covenants restrictive of the user both of the land at the back and of the whole of the premises demised similar to those to be contained in the lease. Finally, the agreement contained a term, upon which great reliance was placed by the plaintiffs, whereby Wisden for himself, his heirs and assigns declared and agreed that, for the purpose of building and completing the crescent conformably to the plan, and for maintaining the uniformity and regularity thereof when completed, every agreement, lease and conveyance of the remaining ground fronting into the crescent which should be entered into and made by Wisden, his heirs and assigns should contain similar stipulations and agreements for ensuring uniformity in the range of the messuages to be erected in the crescent, and the use of the grounds and otherwise as therein mentioned, and that a similar deed of covenant should on every purchase be entered into by such purchaser as was thereafter provided for, and the same regulations and restrictions as to such ground as should be retained and built upon in the intended crescent by Wisden, his heirs and assigns, should be observed by him or them.

Before I make any comment on this agreement, I must pass on to an agreement indorsed upon it on Oct. 30, 1844, and made between the same Wisden and Stone and one William Lambert, whereby it was agreed that 3 houses instead of 2 should be built upon the ground comprised in the agreement, two of them by Stone and the third by Lambert. Certain variations as to rent and other matters were made, but otherwise the parties agreed to observe and perform the provisions and stipulations of the principal agreement. In due course the houses were built, and two of them, which can be identified as Nos. 26 and 28, Montpelier Crescent, were conveyed to Stone or his appointee, and the third of them, No. 27, to Lambert.

In the meantime, on Aug. 22, 1844, an agreement had been made

between Wisden and one John Packham, through whom both the plaintiffs and the defendants derive title. This was an agreement for sale of :

A All that piece or parcel of land or ground in the intended Montpelier Crescent in Brighton aforesaid which is distinguished on the ground plan of the said intended crescent (identified with the signatures of the parties hereto) by the name "Packham" written thereon and containing the several quantities of land therein mentioned and abutting and bounding as delineated and distinguished on the said ground plan [for the sum of £450].

B It provided for the execution by Packham of a deed of covenant which was to be noticed in the conveyance so as to cause the same to run with the land and to bind Packham and all future owners and occupiers thereof, so far as the rules of law or equity would allow, and it was agreed that the deed of covenant should contain covenants by Packham not to erect any buildings on the land other than messuages or dwelling-houses to the value of £600 at least, that the messuages C should be built fronting to the lawn in front of the crescent, and range in a line with the other messuages to be erected in the crescent, and as shown on the ground plan, with provisions as to the line of such buildings, and that he would erect and complete fit and proper for occupation messuages and dwelling-houses of the value and in manner D aforesaid before a certain date, and that the messuages should not, after completion, be altered, and should, in case of damage by fire, be rebuilt. Then, after a covenant to which I need not refer, there was a covenant that no trade or business (except only that of a school or seminary, surgeon or apothecary) should be carried on upon the land E or in the messuages to be erected thereon, and that the same messuages should not be used other than as private dwelling-houses or lodging-houses or for the purposes before-mentioned. Then there was a covenant to make certain contributions for upkeep of the lawn—namely, £1 10s. in respect of each messuage if there should be 3 messuages, and, if only F 2 messuages, then £2 5s. in respect of each messuage. Then there follows a declaration in regard to any moneys recovered by Wisden, to which I need not refer. In due course, 3 houses were built upon the plot of land, which can be identified as Nos. 13, 14 and 15, Montpelier Crescent.

G A consideration of these two agreements reveals that the original intention in regard to the first plot was to build 2 houses upon it, and that this was changed to 3, and that, in respect of the second plot, no intention or agreement as to the number of houses is expressed, but it may be inferred that the purchaser might at his option erect 2 or 3 houses. H It will be further observed that in his agreement with Packham Wisden did not enter into any obligation similar to that in his agreement with Stone that he would require other purchasers to execute similar deeds of covenant, and also that in this agreement the whole of the plot is subject to a single covenant as to user. There was no separate covenant in regard to the land at the back, as there was in Stone's agreement. This

was because the plot abutted at the back, not on Dyke Road or Station Road, but on what I have called the south-western area.

Other agreements were made by Wisden from time to time. On Oct. 30, 1844, he agreed with William Lambert for the lease of a plot again described by reference to a ground plan with a frontage of 35 ft. on the intended crescent. Here the agreement provided that the lease should contain an option to purchase, and other provisions which did not differ in any material respect from those in Stone's agreement, including the provision by which Wisden bound himself to procure the execution of similar deeds of covenant by other purchasers of land in the crescent. The house built on this plot can be identified as No. 33. Upon this agreement there is indorsed a memorandum that the dimensions and contents of the land comprised therein had been altered as shown in the plan thereto annexed. On Dec. 13, 1845, Wisden agreed with James Christmas to let him the piece of land on the south side of Montpelier Crescent lying between the houses lately erected by Mr. Christmas and Mr. Clayton, at the rent and upon the terms therein mentioned. The agreement, which was of a very informal character, contained the term: "the covenant and all other things to be the same as the other houses in the crescent." There is no reference to any ground plan, nor is there any plan annexed to the agreement, nor any stipulation as to the number of houses to be built on this plot. It is not quite clear, but I think that on this plot Nos. 4, 5 and 6, Montpelier Crescent, were in fact erected.

On Dec. 13, 1845, Wisden agreed with the same James Christmas to grant him a lease of :

All that piece of land lying on the south side of Montpelier Crescent in Brighton with the houses lately erected by Messrs. Cheeseman on the north side and by Mr. Thomas Clayton on the south side [for the term and at the rent therein mentioned].

The agreement contained the following term :

The covenants and agreements to be the same as are contained in the lease granted by the said Thomas Wisden to Mr. William Beedham of houses in the same crescent.

The agreement also contained provisions as to purchase and execution by the purchaser in the event of purchase of a deed of covenant containing the like covenants and stipulations for preserving the uniformity of the crescent and keeping up the lawn of the same as were contained in the deed of covenant entered into by the purchasers of other houses in the crescent. It does not appear that Wisden bound himself to require the execution of deeds of covenant by the purchasers. The reference to Beedham's lease must, I think, be to the lease of Dec. 7, 1844, whereby Nos. 16, 17, 18, 19, 20 and 21 were demised to him. This I ascertain from the terms of an agreement of Aug. 29, 1846, between Wisden and Beedham, being an agreement for a lease of a plot of land, described by reference to measurements and to a plan annexed thereon, with the provision that the covenants and agreements were to be the same as those

contained in a lease granted by Wisden to Beedham, dated Dec. 7, 1844, of the houses Nos. 16, 17, 18, 19, 20 and 21 in the same crescent. The agreement also contained an agreement by Beedham that, on the completion of the purchase of the land, he would enter into a deed of covenant containing the like covenants and stipulations for preserving the uniformity of the crescent and keeping up the lawn of the same, and for preserving the respectability of, and freedom from nuisances in respect of, the ground at the back of the house to be erected thereon, as were contained in the deed of covenant entered into by him on his purchase of Nos. 22 and 23, Montpelier Crescent, and the ground at the back thereof. The house built on this plot can be identified as No. 29.

On Dec. 30, 1845, an agreement was made between Wisden and one Christopher Wren Vick which is of some interest. By it Wisden agreed to grant Vick a lease of land described as :

... the remaining piece of land of him the said T. Wisden in the Montpelier Crescent, Brighton, abutting to the house and building of the said Thomas Wisden on the west, to the Dyke Road on the east, for the term and at the rent therein mentioned, subject to the same covenants, stipulations and agreements as are contained in the agreements for leases of the other ground in the same crescent. ...

Vick further agreed to erect 2 houses of the same elevation as the one then erected by Wisden adjoining the ground. The agreement is of an informal character, and there is no reference to any ground plan or map. Vick failed to comply with his obligation, and the agreement was determined upon certain terms on Aug. 25, 1847. It seems clear that upon this plot, on which Vick had agreed to erect 2 houses, one house only, No. 38, was subsequently erected.

The last agreement to which I refer is one of Apr. 2, 1849, whereby Wisden agreed to grant to Charles Wisden and Thomas Anscombe a lease of land described by reference to a ground plan drawn in the margin thereof, with the messuage in course of erection thereon, which was intended to be distinguished as No. 37. This agreement provided for covenants to be contained in the lease similar to those which I have already stated in the more formal agreements, for an option for purchase, and for the execution by the purchaser of a deed of covenant similar to the covenant entered into by the purchasers of the other messuages in the crescent.

I have now referred to all the agreements which have been put in evidence. They do not cover the whole area, but, as will presently appear, even where agreements are lacking, it is made plain by conveyances and deeds of covenant how the whole area was in fact developed. It is possible to refer to only a few conveyances. On May 6, 1844—that is, before the date of any of the agreements I have seen except Stone's agreement—Wisden conveyed to Childens and Cheesman two parcels of land very fully and elaborately described by definition and reference to the plan annexed thereto, subject to the covenants, conditions and stipulations contained in an indenture of even date therewith, and Wisden thereby covenanted that, for the purpose of building and com-

pleting the crescent conformably to the intended plan, and for maintaining the uniformity and regularity thereof when completed, every agreement, lease and conveyance of the remaining ground in the intended crescent which should be entered into by Thomas Wisden, his heirs or executors should contain stipulations similar to those contained in the indenture of covenants of even date, and that the respective lessees or purchasers should enter into like covenants for ensuring uniformity in the range of messuages to be erected in the crescent, and other matters therein mentioned, and that Thomas Wisden and his heirs and assigns should be subject to the same stipulations and restrictions in respect of such pieces of ground as should be retained and built upon by them, and, further, that Thomas Wisden, his heirs and assigns, so long as they should retain possession and ownership of the piece of land abutting on the north or north-west (meaning, surely, to the south or south-west) of the land thereby conveyed, or lying between the same and the new road to the railway station, would not erect or permit thereon any public livery stables, slaughter-house or cowshed or erect any house thereon of less value than £250, and finally, that, when and in case he or they should sell or demise that piece of land lying between the land thereby conveyed and the last-mentioned road, or any part thereof (except the land sold or demised to Messrs. Catt), he or they would require the purchasers or lessees in their respective conveyances or leases or deeds of covenant to enter into similar stipulations for preserving the respectability of the neighbourhood. The plan annexed to the conveyances indicated the broad features of Montpelier Crescent and the parcel conveyed, but did not contain any information as to the number of plots or the method of plotting. Upon these parcels of land so conveyed were erected the 6 houses Nos. 7, 8, 9, 10, 11 and 12, Montpelier Crescent. I defer reference to the deed of covenant mentioned in this conveyance until I have referred briefly to the other material conveyances.

It will be remembered that on Aug. 22, 1844, Wisden had entered into an agreement with Packham, through whom both the plaintiffs and the defendants derive title. On July 31, 1845, effect was given to this agreement by a conveyance by Wisden to Packham of a parcel of land therein described and delineated on the plan drawn on the back thereof :

. . . with the 3 several messuages or dwelling-houses and other buildings then in course of erection on the said piece of land or on some part thereof and respectively numbered or intended to be numbered and in Montpelier Crescent.

The conveyance contained among other provisions a covenant by Wisden that he, his heirs and assigns would at all time permit the lawn in front of the intended crescent to be used as and for a pleasure ground only, and, further, a covenant similar to that contained in the conveyance to Childens and Cheesman in regard to procuring the execution of similar deeds of covenant for the purpose of building and completing the Crescent conformably to the intended plan, and for maintaining the uniformity

and regularity thereof when completed. Wisden did not enter into any covenant in regard to the land at the back, between the land conveyed and the Station Road. The plan annexed to the conveyance shows only the parcel of land conveyed, with the parcel adjoining it on each side. On the same day, Packham entered into a deed of covenant to which

- A I will refer later. On the next day, Aug. 1, 1845, Packham conveyed to William Russell and Samuel Russell a strip of land which appears to have been as nearly as possible one-third of the land comprised in the conveyance of July 31, 1845, with the messuage in course of erection upon it. From a recital in the conveyance it is made plain that the purchaser
- B had notice of the deed of covenant entered into by Packham on the preceding day and the restrictive covenants therein contained, but he entered into no covenants with Packham, and Packham did not enter into any covenants with him, in regard to the other part of the land which he had purchased from Wisden, or assign to him expressly at least
- C the benefit of any covenant entered into by Wisden. The property comprised in this conveyance is that now known as No. 14, Montpelier Crescent, of which the plaintiffs are the owners.

- On Aug. 1, 1845, by a conveyance in every material respect comparable to that of No. 14, Packham conveyed to Thomas Smith the
- D property now known as No. 13, Montpelier Crescent, of which the defendants are the owners. The property also was as nearly as possible an equal third of the property comprised in the conveyance by Wisden to Packham of July 31, 1845. The remaining one-third of the same property comprising No. 15, Montpelier Crescent, was on Oct. 30, 1846,
- E conveyed by Packham to one Crosier by a conveyance which also was, so far as is relevant to any question I have to decide, in terms strictly comparable with those of Nos. 13 and 14.

- I pause at this point in a long narration of facts to observe that here arises the final question which I have to decide—namely, whether,
- F assuming in the plaintiffs' favour a general building scheme, there was such a relation between the Russells, Thomas Smith and Crosier, all of them claiming under Packham, as to entitle each of them to enforce against the others the covenant into which Packham had entered. I defer the consideration of this question to a later stage.

- G None of the other original conveyances of land in Montpelier Crescent has been produced, though I get some information as to the contents of some of them from the deeds of covenants to which I next refer. It appears from these deeds of covenants that, in the case of every conveyance of land in Montpelier Crescent, except Nos. 1 and 2 (the houses at
- H the north-west of the crescent), Wisden or his successors in title required and obtained from the purchasers the execution of a deed of covenant. The earliest of these documents was dated May 6, 1844, and was executed by Childens and Cheesman in respect of the houses later known as Nos. 7, 8, 9, 10, 11 and 12, Montpelier Crescent, which had been comprised in the conveyance of the same date to the same parties. One other of

them was executed on Dec. 6, 1844, by Beedham in respect of Nos. 22 and 23, Montpelier Crescent. Five other such documents were executed in the course of 1845, including one by Packham executed on July 31 in respect of Nos. 13, 14 and 15. Nine other such documents were executed in the course of 1846, 2 others—namely, those in respect of the houses Nos. 38 and 39—in 1851, one other in respect of No. 37 on Dec. 8, 1899, A and, lastly, one in respect of No. 36 on Nov. 24, 1906. I will refer as briefly as possible to the earliest of these deeds, that executed by Childens and Cheesman on May 6, 1844, in respect of Nos. 7, 8, 9, 10, 11 and 12, Montpelier Crescent. The contemporaneous conveyance is recited, the description of the crescent as “a crescent now being formed and erected B and intended to be called Montpelier Crescent” being repeated, as also that of the parcels themselves, such parcels being two in number and having the one a frontage of 67 ft. and the other a frontage of 62 ft. on the crescent. The covenants are (i) a negative covenant not to build C on the 2 parcels of land any building other than dwelling-houses, with the convenient offices and outbuildings, with provisions as to the situation of such dwelling-houses by reference to the ground plan of the intended crescent drawn in the margin thereof, (ii) an affirmative covenant forthwith to build upon the 2 parcels 6 dwelling-houses of the value of £600 D at least, and, in case they should be destroyed by fire, to rebuild them in the same line, and of the same value, description and character, as those destroyed, (iii) a negative covenant not to erect any building on the ground in front of the dwelling-houses, which was to be used only as an ornamental garden, and remain at all times enclosed with a neat iron or wood fence, (iv) a negative covenant as to user (which I will state E once more and for the last time) not to carry on or suffer to be carried on any trade or business whatsoever (excepting only that of a school or seminary, surgeon or apothecary) upon the same premises, nor to use or permit to be used the same messuages other than as private dwelling-houses or lodging-houses or for the purposes before mentioned, and (v) F a covenant to pay to Wisden, his heirs, appointees or assigns or other the owner or owners for the time being of the fee simple of the lawn in front of the crescent, an annual sum not exceeding £1 10s. in respect of each house to be erected on the parcels, with a right to distrain for such sums, and a declaration that they should be applied for upkeep of the G lawn, but that nothing in those conditions should constitute Wisden and such other persons as aforesaid trustees of such power of distress. Finally, there was a declaration that the covenant should affect and run with all and singular the parcels of land and the messuages erected thereon, so far as the rules of law and equity permitted. II

The other deeds of covenant were in terms which exhibited only the following differences. First, where, as was sometimes the case, the houses had already been completed, there was some variation in the form of the covenant. Secondly, there was some variation in the amount to be paid by way of contribution to the upkeep of the garden. Thirdly,

in every case where the parcels conveyed backed not on the south-western area, but on Dyke Road or Station Road, and where, accordingly, in the plan annexed to the deed of covenant, the main part of the land was coloured blue, and the other part of it abutting on either of those roads was coloured yellow, the covenant as to user was in a double form,

A the covenant in respect of the part coloured blue being as I have already stated it, but that in respect of the part coloured yellow being not to build thereon any messuage of less value than £250, and not to carry on thereon the trade, business or calling of a tavern-keeper or hotel-keeper, an innkeeper or beershop-keeper, or a public livery stable-keeper, nor

B sell or permit to be sold thereon any wine, beer, ale or spirituous liquor, nor use any building or shed thereon as a slaughter-house or cowshed. Fifthly, whether designedly or by error, the value of each of the houses Nos. 13, 14 and 15 was to be £500, instead of £600 as in every other case. Sixthly, in respect of No. 37, the covenant in respect of the user of the

C yellow land was expanded so as to cover any noisy, noisome, offensive or dangerous trade or business whatsoever. This, it may be noted, was of a much later date, for the deed was not executed until 1899. Finally, in the single case of the deed of covenant executed on Aug. 12, 1846, by Richard Lane in respect of No. 35, Montpelier Crescent, there

D was a covenant by Wisden that, in the case of every sale theretofore made by him of a plot of land forming part, or intended to form part, of Montpelier Crescent, the purchaser of such plot had already entered into covenants applicable in each case to the plot of land sold similar in all

E respects to the covenant thereinbefore contained on the part of Lane, and further that, in the case of every sale, demise or other disposition of any other such plot, the purchaser should, at the completion of the purchase, enter into precisely similar covenants in respect of such plot with Wisden, his heirs and assigns. Covenants of similar import had been entered into by Wisden in some of the agreements and conveyances

F to which I have referred, but he does not appear to have been required to do so in any deed of covenant other than this.

It will have been noticed that I have so far made no mention of Nos. 1 and 2, Montpelier Crescent. With regard to these houses, no evidence whatever has been given, except that there has been produced

G a document which is admitted to be the particulars and conditions of sale of (*inter alia*) these two houses. From this, it appears that on Apr. 6, 1908, these houses were put up for sale by auction by direction of trustees under the will of the late Colonel Wisden, and were sold under special conditions which provided (i) that they were sold subject to a covenant contained in a conveyance of Apr. 20, 1844—that is, the covenant by

H Thomas Wisden upon his sale to Vallance and Catt, which I have set out earlier in this judgment—and (ii) that the purchasers should, simultaneously with the execution of their respective conveyances, execute a deed of conveyance with the vendors in a form previously prepared. I have not, I hope, omitted in this tedious narrative any material fact

bearing on this question whether there was a building scheme binding *inter se* the several purchasers of the several plots in Montpelier Crescent, and persons claiming through them respectively.

The essentials of such a scheme, according to *Elliston v. Reacher* (1), which has been followed in many recent cases—notably, *Reid v. Bickerstaff* (2) and *Kelly v. Barrett* (3)—are (i) that the plaintiffs and defendants should derive title under a common vendor, (ii) that, before selling the land to which the plaintiffs and the defendants are respectively entitled, the vendor should have laid out his estate, or a defined portion thereof, including the plaintiffs' and the defendants' land, for sale in lots subject to restrictions intended to be imposed on all the lots, and consistent only with some general scheme of development, (iii) that these restrictions should be intended by the vendors to be, and should be, for the benefit of all the lots sold, and (iv) that both plaintiffs and defendants, or their predecessors in title, should have purchased their lots from the vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the purchasers of the other lots included in the general scheme. The first condition is here satisfied. It is only upon the final question that it is material that the plaintiffs and defendants had a common ancestor in two generations. The second, third and fourth conditions to some extent overlap. There must be a defined area laid out for sale in lots. I will assume in favour of the plaintiffs that it is the area covered by Nos. 1 to 38, Montpelier Crescent, including, since it cannot on any ground be excluded, that part of several plots which was coloured yellow on the plans annexed to the several deeds of covenants. Was this area before the sale to Packham, which I take as being on Aug. 22, 1844, the date of the agreement for sale—laid out for sale in lots subject to restrictions intended to be imposed on all the lots? At this point, I think, the plaintiffs' case breaks down. I cannot as a matter of strict proof, or even as a matter of reasonable inference and conjecture, find that the defined area was ever so laid out. That there was some ground plan showing the layout in a general way is evident, but I think that the evidence points against, rather than in favour of, any plan which showed the whole area and the way in which it was lotted. I have already pointed out how in certain cases the number of houses to be built on a parcel comprised in one sale was left in uncertainty, and, if I had to hazard a guess, I should be inclined to say that Wisden, having formed a general plan, was content to sell off parcels of varying sizes according to the requirements of his purchasers, leaving it as yet undetermined how many houses were to be built on each parcel, and, therefore, how many separate lots might ultimately be formed. In the same way, I should conclude that the areas to be coloured respectively blue and yellow of the parcels abutting on Dyke Road or Station Road were not predetermined in any original layout, but were the subject of individual bargaining in each case. I cannot in any other way account for the irregularity of the proportions of blue and yellow. The importance

- of clear evidence of an original layout in building plots has been repeatedly asserted : *Kelly v. Barrett* (3), *per* WARRINGTON, L.J., at p. 405, and *Osborne v. Bradley* (4), *per* FARWELL, L.J., at p. 453. In this very artificial branch of the law, it is, I think, undesirable to seek to qualify such authoritative statements by fine distinctions. It may, no doubt,
- A be urged that, even without a division of the building estate into plots, there may be sufficient evidence of a building scheme, and I do not wish to rule out some exceptional case. It is sufficient to say that, in the circumstances of the present case, I see no adequate reason for departing from the established rule.
- B If, however, I am wrong upon this point, and the conditions of layout of the estate for sale in lots subject to restrictions intended to be imposed on all the lots is satisfied, I should feel some doubt whether the third or fourth conditions were satisfied. It is no doubt true that in some cases, though by no means in all, the vendor at the time of sale represented that
- C there would be similar restrictions affecting all the land in Montpelier Crescent, and went so far as to bind himself that there should be such restrictions. Moreover, it is true that in every case there were in fact similar restrictions, with such variations only as I have pointed out. From this it is a short step to the inference that the vendors intended the
- D restrictions to be for the benefit of all the lots sold, and that it was upon this footing that the several purchases were made. To this view, however, there are certain objections. The transactions with which we are concerned began in 1843, many years before the modern doctrine of a building scheme had first been stated. In truth, the first hint of that doctrine is,
- E I think, to be found in the judgment of LORD ROMILLY, M.R., in *Western v. MacDermott* (5), in 1866, but already by 1843 the device was well known of securing the same result by means of deeds of mutual covenants whereby the vendors and the purchaser of every lot were brought into immediate contractual relation with each other, or alternatively, by
- F means of vesting the restrictive covenants in the vendor or in third parties as trustees for all persons from time to time entitled to the several lots, a matter described by SHADWELL, V.-C., in 1839, as " perfectly familiar to the mind of every lawyer " ; see *Schreiber v. Creed* (6), at p. 33. It is, I think, a matter entitled to some consideration that the vendor,
- G Wisden, did not adopt either of these expedients, but took separate covenants from each purchaser, so that the purchasers were not brought into legal relation with each other. If an intention is to be ascribed to the vendor, it is surely possible that he had no other than to enhance the price of what he sold by promising to impose restrictions on other purchasers, and that he did not intend to assign, as he did not in fact assign, and that he was not a trustee of, as he did not in fact declare himself to be a trustee of, the benefit of any restrictive covenant entered into by one purchaser to or for any other purchaser. I feel considerable difficulty in ascribing to Wisden an intention which, if it was to be effective, rested on a doctrine then unborn which was hinted at 20 years later by
- II

LORD ROMILLY, M.R., but only found its full deliverance in the opinion of LORD MACNAGHTEN in *Spicer v. Martin* (7).

A further difficulty is that which I have already pointed out, but which here also has its relevance. Not only were the several purchasers not brought into legal relation with each other, but also they had no means, in the absence of a lotted plan, of knowing who or how many the other purchasers would be, or what would be their holdings. Here again I find some difficulty in the attribution either to the vendor or to any purchaser of the intention that all the purchasers unnumbered and unknown, and persons claiming through them, should have against each other the right to enforce their respective covenants. In particular, I find a difficulty in assuming any such intention in regard to the yellow land and the persons from time to time entitled thereto. B

Holding, as I do, that the plaintiffs, upon whom the burden lay, have not established that there was a general building scheme covering the plaintiffs' and the defendants' land, it is not strictly necessary to determine the final question—namely, assuming a general building scheme, so that Packham and Beedham and Christmas and all the other purchasers, and all persons claiming through them, could *inter se* enforce the restrictive covenants, what is the position *inter se* of the plaintiffs and defendants, both of whom claim through the original covenantor and purchaser, Packham? However, since the question has been fully argued, it is desirable that I should state my views upon it. The question is: can the plaintiffs and defendants mutually enforce against each other the covenant into which Packham entered in respect of both their houses? Both of them took with notice of the restrictive covenants. C so that, upon the assumption which I have made, Beedham, for instance, or Christmas, could have enforced the covenants against either of them. D I will assume further that not only Beedham, let us say, but also the numerous purchasers of the plots into which the parcels bought by him were carved had the the same rights against the several purchasers of the plots into which Packham's parcel was carved. However, upon the position *inter se* of the persons claiming through Packham, these assumptions do not lead to any conclusion. Of authority upon the point there is little. In *King v. Dickeson* (8), one who had purchased a lot upon the sale of a building estate, where the vendor and the several purchasers had entered into a deed of mutual covenant, mortgaged part of his lot. E The mortgagee had notice of the restrictive covenants, but entered into no covenant with his mortgagor. He afterwards foreclosed and later sold the mortgaged land, part of which became vested in the defendants, who took with notice of the restrictive covenants. F NORTH, J., held that the mortgagor could not, as against the defendants, enforce the restrictive covenants. The mortgagee and those claiming through him took the mortgagor's land subject to all the rights imposed on the land by the mortgagor's covenant, but the mortgagor did not by implication create, as against the mortgagee, any new right or obligation in his own G H

- favour. I think that, though NORTH, J., does not use the words, he would have regarded this assertion of any such right as a derogation by the mortgagor from his grant. This decision was in Mar., 1889. The judgment in *Spicer v. Martin* (7), which had been given in the previous December, appears not to have been cited. In *Knight v. Simmonds* (9), an estate
- A had been laid out and sold in lots under a building scheme. The purchasers of certain lots, for convenience called "the green estate," subsequently sold them in smaller plots, and by a deed of mutual covenant they and their subpurchasers entered into a series of restrictive covenants intended to govern those lots. These covenants, though in substantial
- B accordance with the original covenants governing the whole estate, differed in one essential feature—namely, that, whereas under the original covenant no trade or business might be carried on upon the estate, under the covenant in the deed of mutual covenant this was modified so that only those businesses were prohibited which were noisy, noxious,
- C dangerous or offensive to the neighbourhood, or to the owners or occupiers of the green estate. It was held by ROMER, J., that, though the subpurchasers of lots forming part of the green estate, taking with notice of the original covenants, could be compelled to observe them at the suit of the owner of any part of the original estate other than the green
- D estate, yet *inter se* they were governed only by the substituted covenants in the deed of mutual covenants. In other words, there was a subscheme, with a new local law, which prevailed over the original scheme, with its local law. The case went to the Court of Appeal, but not upon this point. From this case I get little to help me to reach a decision in a
- E case where there is no substitution of new covenants for old, and, therefore, no inference that the covenantors being bound by the new covenants are not to be bound by the old. At the highest, it can be said that ROMER, J., did not say that in any case the subpurchasers would not be bound *inter se* by the original covenant.
- F Next, *Elliston v. Reacher* (1) was cited on this part of the case, reliance being placed on the observations of SIR H. H. COZENS-HARDY, M.R., at p. 673. These can only be understood in the light of the facts of the case. The plaintiffs were (a) Elliston and (b) certain persons who derived title to their lots through H. C. Cobbold. PARKER, J., held that Elliston
- G was entitled to enforce the covenants into which the defendants' predecessors in title had entered, but that the other plaintiffs were not so entitled, because H. C. Cobbold, through whom they claimed, was also a predecessor in title of the defendants, and had joined in a conveyance of the land claimed by them, which, upon its true construction, as the
- H judge held, left the purchaser at liberty, so far as the vendors were concerned, to deal with the property as he liked, subject only to his observing the covenants into which he then entered. The plaintiffs then could be in no better position than was H. C. Cobbold, and could not enforce the original covenants against the defendants. This decision seems exactly in line with that of ROMER, J., in *Knight v. Simmonds* (9). The

unsuccessful plaintiffs did not appeal, but, upon an appeal by the defendants against the decision in favour of Elliston, an argument was addressed to the court upon which SIR H. H. COZENS-HARDY, M.R., says, at pp. 672, 673 :

Then it was argued, somewhat boldly, that the whole scheme was at an end, if I follow the argument rightly, because of the 4 lots which were purchased by Mr. H. C. Cobbold ; so far as appears, he was the only purchaser of the property ; the other deeds were not produced, and it was unreasonable to suppose that there was any contract entered into between Mr. Cobbold as purchaser of lot 26 and Mr. Cobbold as purchaser of lot 27. I cannot assent to that. I do not think that is the true way to look at it. The very essence of every scheme of this kind is that it does not depend on the fact of there being separate purchasers of each lot, but it means that each lot, into whosoever hands it comes, whether into the hands of the man who has bought half a dozen lots, or originally to a man who has bought one lot from the vendor, shall be subject in either case to the burden and have the benefit of the restrictive covenant.

I do not find it easy to follow the argument to which reference is made, either from the argument of counsel as reported or from the statement of facts in the Court of Appeal, or in the court below. However this may be, it is clear that the point to which SIR H. H. COZENS-HARDY, M.R., was directing his observations was not the relation *inter se* of sub-purchasers of parts of an original lot where they have themselves entered into no covenants with their vendor, or with each other, but the relation *inter se* of purchasers of different lots which had originally been acquired by the same purchaser. I should respectfully agree that in such a case it would be impossible, the other ingredients of a building scheme being present, to exclude it either in whole or in part because more than one lot was originally purchased by the same person. This is not the question in the case before me, which, as it appears to me, raises a point never before discussed. It is one thing to say that the owner of a lot who disposes of part of it cannot himself insist on the observance of restrictive covenants unless his purchaser has covenanted to observe them (see *King v. Dickeson* (8)), or that as between several subpurchasers a new local law supersedes an old local law (see *Knight v. Simmonds* (9)). In the former case, the principle of derogation from grant, and in the latter the maxim *expressum facit cessare tacitum*, justifies the decision. It is quite another matter when it appears that the purchaser of an original lot subdivides it and disposes of the sublots without imposing any new burdens, but in such manner that the purchasers have notice of the old ones. The question then arises, whether by the application or by the logical extension of this principle of *Spicer v. Martin* (7) the sub-purchasers are bound *inter se* by the old covenants. Is this a case in which "community of interest" requires and imports "reciprocity of obligation" ? It is, I think, clear that it is only upon this principle, if at all, that the subpurchasers can be so bound. They have entered into no covenant with their vendor or with each other. He has entered into no covenant with them. It follows that none of them has had assigned to him the benefit of a covenant by the others, nor has there been a covenant by any of them the benefit of which inhered in the

land and without express assignment passed upon the conveyance of it. Such a benefit may pass with the land to which it has been annexed, even though the purchaser is unaware of it (see *Rogers v. Hosegood* (10)), a hidden treasure which may be discovered in the hour of need, but it must first have been so annexed. The importance of this is made clear

A by an examination of the principle established in *Spicer v. Martin* (7). In that case, LORD FITZGERALD, said, at p. 18 :

B There is . . . every ingredient in this case from which we may reasonably infer an intention that the lessees or purchasers were to be protected by and have the benefit of the restrictive covenant as between Spicer and the commissioners and to be bound by a similar obligation entered into by each on his own behalf . . . I cannot entertain any reasonable doubt that, as between the appellant and the respondent, the latter was, according to right and justice, entitled to the full benefit and protection of the restrictive covenant which the vendor had entered into with the commissioners.

C In the same case, LORD MACNAGHTEN, at p. 24, cites the well-known passage from the judgment of HALL, V.-C., in *Renals v. Cowlishaw* (11), and says that he would not be disposed to hesitate to extend the principles recognised in that case, but that they must apply to and govern the case before him. There are two sentences in the cited passage to which I would refer. HALL, V.-C., said, at p. 129 :

D This right [the benefit of the covenant] exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established.

At this stage, HALL, V.-C., rests the principle on contract, and on nothing but contract, express or implied. Then he goes on, at p. 129 :

E A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant [this should be "contract"] . . . may be collected from the transaction of sale and purchase.

F Here too it is clear that HALL, V.-C., had nothing in mind except the creation and assignment of rights which were in their origin contractual, though ultimately they might assume the character of quasi-easements. However, in the application of the principle of *Renals v. Cowlishaw* (11) to the case before him, LORD MACNAGHTEN used language which went far beyond it. He said, at p. 25 :

G This restriction was obviously for the benefit of all the lessees on the estate ; they all had a common interest in maintaining the restriction. This community of interest necessarily, I think, requires and imports reciprocity of obligation.

H It does not fall to me to decide whether or not LORD MACNAGHTEN intended to establish a new equitable right independent of any original contract, express or implied. That follows from what was said by PARKER, J., in *Elliston v. Reacher* (1), at p. 385, where, after stating that the implication of mutual contract is not always a perfectly satisfactory explanation, since the circumstances may often preclude the possibility of actual contract, he says :

. . . and yet the equity may exist between them. It is, I think, enough to say, using LORD MACNAGHTEN'S words in *Spicer v. Martin* (7), that where the four points I have mentioned are established, the community of interest imports in equity

the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase.

This, then, is the equity upon which the plaintiffs must rely, an equity which is created by circumstances and is independent of contractual obligation. It arises only where the four points he mentions are established. That means, in the present case, that they must be established, not in relation to the estate as a whole (for that is for the purpose of this part of the case assumed), but in relation to the plots created by the subdivision of Packham's plot. The question may, I think, be put in this way: Was there, in regard to this plot, a subscheme which satisfied the four conditions? Let me recapitulate the few relevant facts. Packham acquired his land on July 31, 1845, and entered into the contemporaneous deed of covenant under which he was bound, *inter alia*, to erect 3 houses on his plot. On Aug. 1, 1845, he conveyed one-third of his plot, with one house, to the plaintiffs' predecessor in title, and another third, with another house, to the defendants' predecessor. Of the other third he did not so quickly dispose, but he mortgaged it on Aug. 11, 1845, and conveyed it on sale in Oct., 1846. All these purchasers had notice of the conveyance by Wisden to Packham, and of the deed of covenant, and knew, therefore, amongst other things, of Wisden's covenant in regard to maintaining uniformity. They knew then that they were severally liable to have the restrictive covenants enforced against them by the owners of other parts of the estate against whom they might hope reciprocally to enforce them. This is the background against which I examine the four points. First, then, both plaintiffs and defendants derive title from a common vendor, Packham. Second, before selling to either of them, he had bound himself to build 3 houses on his land. This is the equivalent of division into three lots. He had further bound the land by restrictions subject to which he sold the 3 lots. This is the equivalent of imposing restrictions upon them. The third and fourth conditions rest on the intention of the parties, which is to be gathered from all the circumstances. If, upon the facts stated, the assumption of a general building scheme has been rightly made, it appears to me an irresistible inference that it was the common intention of Packham and of the purchasers from him that within the enclave comprising Nos. 13, 14 and 15, Montpelier Crescent, this same local law should prevail. There is no question here of a new local law, as there was in *Knight v. Simmonds* (9). If such was not their intention, then I must conclude that they intended, while competent to enforce the covenants against the occupiers of the remotest houses on the estate, and liable at their suit to have them enforced, yet to be powerless in regard to the conduct of their nearest neighbours. To such a conclusion I should not willingly come, if any other is open to me. It appears to me that I can properly hold, as the logical application of the equitable rule stated in *Spicer v. Martin* (7), that there is in this case just that community of interest between the purchasers from Packham which

creates reciprocal obligations between them. As I have already pointed out, however, this conclusion rests upon the assumption of a general building scheme. Without that assumption, it would not be possible to lay the foundation for an application of the rule. Inasmuch as I have decided that the plaintiffs have not proved the general building scheme, my view on the final question will not help them. The action must, as against the South County Freeholds, Ltd., be dismissed with costs.

Action dismissed with costs.

Solicitors : *Kennedy, Lindo & Co.*, agents for *C. Burt Brill & Edwards*, Worthing (for the plaintiffs) ; *T. & N. Blanco White* (for the defendants).

[*Reported by MAURICE SHARE, Esq., Barrister-at-Law.*]

BURDON AND OTHERS v. BARRON AND OTHERS.

C [KING'S BENCH DIVISION (Greaves-Lord and Hilbery, JJ.), **April 18, 1939.**]

Local Government—Election of aldermen—Persons entitled to vote—Office of mayor and alderman held by same person—Right of mayor to vote—Casting vote of mayor—Municipal Corporations Act, 1882 (c. 50), s. 60—Municipal Corporations Amendment Act, 1910 (c. 19), s. 1—Local Government Act, 1933 (c. 51), ss. 17, 21, 22.

P. was the mayor and an alderman of the county borough of Gateshead. In Nov., 1938, P. presided at a meeting held for the purpose of electing a number of aldermen. Fifteen votes, including that of P., were cast for one Peacock and the 4 respondents, and 15 votes were cast for 4 other persons. Thereupon P., as president of the meeting, gave a casting vote in favour of Peacock and the 4 respondents. On behalf of the petitioners, the councillors of the borough, it was contended that, as P. was also an alderman of the borough, he was, by virtue of the Local Government Act, 1933, s. 22 (2), not entitled to vote at the election, and that, consequently, there had been no equality of votes entitling him to exercise a casting vote in favour of Peacock and the 4 respondents. On behalf of the respondents, the persons elected, it was contended that P. was entitled to vote as mayor, notwithstanding the fact that he was not only mayor, but also an alderman of the borough :—

HELD : P. was entitled to vote, and the candidates elected through P. giving a casting vote were duly elected aldermen.

[**EDITORIAL NOTE.** This petition raises the short point whether an alderman acting as mayor can cast a vote which he could cast as mayor but which he could not cast as an alderman. This is viewed as a matter of the construction of the relevant statutory provisions, but the court have approached the matter with the view that a restriction upon voting should be construed as strictly as the words allow.

AS TO ELECTION OF ALDERMEN, see HALSBURY, Hailsham Edn., Vol. 21, p. 132, para. 238 ; and FOR CASES, see DIGEST, Vol. 33, p. 70, Nos. 435-445.]

Case referred to :

(1) *Bridport Case, Hounsell v. Sutill* (1887), 19 Q.B.D. 498 ; 20 Digest 137, 1114 ; 56 L.J.Q.B. 502 ; 57 L.T. 102.

ELECTION PETITION by way of special case stated for the opinion of the court, pursuant to an order of HILBERY, J., made under the Municipal

Corporations Act, 1882, s. 93 (7). The facts proved or admitted were as follow. A meeting of the council of the county borough of Gateshead was held on Nov. 9, 1938, for the purpose of electing 5 aldermen. There were 9 candidates. Twenty-nine councillors, some of whom were the petitioners in this case, were present and entitled to vote. One William John Pickering, the mayor and an alderman of the borough, presided at the meeting. Fifteen persons voted for one Peacock (since deceased) and the 4 respondents, and 15 persons voted for the remaining 4 candidates. Among the 15 persons who voted for the respondents was the mayor, William John Pickering. Acting upon the assumption that he was entitled to vote in the first instance, and that consequently there was an equality of votes, Pickering, in his capacity of president of the meeting, gave a casting vote in favour of Peacock and the respondents, purporting to act in pursuance of the Local Government Act, 1933, s. 22 (5), which provides that "in the case of an equality of votes the person presiding at the meeting, whether or not entitled to vote in the first instance, shall have a casting vote." Thereupon the petitioners contended that, by virtue of the Local Government Act, 1933, s. 22 (2), which provides that "an alderman shall not, as such, vote at the election of an alderman of the borough," Pickering was not entitled to vote in the first instance, that accordingly there was no equality of votes, and that for that reason there was no power to exercise a casting vote in favour of the respondents. The respondents contended that Pickering was entitled to vote notwithstanding the fact that he was an alderman. The question asked was whether the respondents were the persons who had received the greatest number of votes or whether the other candidates had been duly elected. The opinion of the court was also sought on the question as to who should be liable to pay the costs of the present proceedings.

D. P. Maxwell Fyfe, K.C., and *Constantine Gallop* for the petitioners.
J. Charlesworth for the respondents.

GREAVES-LORD, J. : I think that the constitution of the council is perfectly clearly set out in the Local Government Act, 1933, s. 17. In sect. 17 (1) (c), the mayor is described, and he is also described in sub-sect. (2) as a specific part of the council, as mayor. Sect. 22, which deals with the election of aldermen, is, first of all, preceded by sect. 21, which provides as follows :

(1) The aldermen of a borough shall be elected by the council of the borough from among the councillors or persons qualified to be councillors of the borough.

Then sect. 22 deals with the election of aldermen, and there is only one prohibition or restriction in that section :

(2) An alderman shall not, as such, vote at the election of an alderman of the borough.

In this case, Alderman Pickering, who sat and presided at the council by virtue of his office as mayor, voted. There is no doubt about it that he could look to sect. 17 (2) for his right to vote, and, in my opinion, his vote

as mayor was not given in any other capacity. In those circumstances, he had a right to vote at the initial election, and, also, if the occasion arose, he had a casting vote under sect. 22 (4). That subsection is very carefully worded, and is very carefully worded to exclude any question of this kind. It provides as follows :

A The person presiding at the meeting, as soon as all the voting papers have been delivered to him, shall openly produce and read them, or cause them to be read, and then deliver them to the town clerk to be kept for 6 months.

Subject. (5) provides as follows :

In the case of an equality of votes the person presiding at the meeting, whether or not entitled to vote in the first instance, shall have a casting vote.

B This election was, in my opinion, carried out in full conformity with the powers and rights of the parties and of the mayor of Gateshead, and, therefore, I have, on my part, nothing to do but to declare that the election was perfectly valid.

C HILBERY, J. : I am of the same opinion, but, as this is said to be a matter of some importance, and hitherto not the subject of authority, I think that it is only proper and right that I should express myself in my own language upon the topic which is before us. The question before

D us is whether or not, at the election of aldermen of the borough of Gateshead upon the occasion in question, the mayor, Mr. Pickering, cast his vote in the election of aldermen regularly, because the result of his casting his vote in that election of aldermen was that an equal number of votes was cast for each of the two sets of candidates. In consequence of

E an equal number of votes being cast for each set of candidates, the mayor, as chairman, and as the person in the chair presiding at the meeting, then gave a casting vote. It is not objected that he had no right to give a casting vote if there was an equal number of votes regularly cast in the first election for each of the two sets of aldermen, but what is

F said is that he could not cast a vote in the election of aldermen so as to make the numbers equal for each set of candidates, because, although he was mayor, he was in fact an alderman, and it is said that, as an alderman, he was disqualified from voting in the election of aldermen. The question as to whether or not he was so disqualified must be determined

G by looking at the Act of Parliament which governed the election—namely, the Local Government Act, 1933. In that Act, sect. 17 provides as follows :

(2) The council of a borough shall consist of the mayor, aldermen and councillors and shall exercise all such functions as are vested in the municipal corporation of the borough or in the council of the borough by this Act or otherwise.

H There is power given to the council to elect aldermen. Sect. 21 (1) provides as follows :

The aldermen of a borough shall be elected by the council of the borough from among the councillors or persons qualified to be councillors of the borough.

It follows from those two sections, as it seems to me, that aldermen for any borough are to be elected by the council, and that the council electing

them is to consist of, *prima facie*, the mayor, aldermen and councillors. However, sect. 22 goes on to make a special set of provisions affecting the election of aldermen, and, instead of the election of aldermen being, as it had been by the other sections, by the council—that is to say, the body consisting of the mayor, aldermen and councillors—it is to be held, and the election is to be decided, by that council, subject to those provisions in sect. 22. Then sect. 22 (2) provides as follows : A

An alderman shall not, as such, vote at the election of an alderman of the borough. There remains, therefore, as the electoral body, the mayor and the councillors, but no alderman may cast a vote, in that election of other aldermen, in his capacity as alderman. The question, as I have said, is whether or not the mayor, Mr. Pickering, in voting, was able to vote as mayor, having regard to the fact that he was an alderman. It is quite plain that, if he was there as an alderman, he could not vote in the election, because he would then be voting “as such.” B

I think that the first thing to remember is that he must be presumed to have done that which he did do as a lawful act. He could not lawfully, as an alderman, have cast a vote in his capacity as an alderman. He could lawfully cast a vote as mayor, because sect. 22 left the constituent assembly, the mayor and the council. If that be right, it would seem to follow that the vote which he cast was cast by him as mayor, and, his vote being cast by him as mayor, and the mayor being a separate entity of the council quite different from the aldermen, the result is that the vote was cast by him as mayor, and not by him as alderman. To put it in that way, it would not seem an irregular vote, or a vote which he was disqualified from casting. If that be right, I think that that would be sufficient to determine the matter. Something has been said, however, about the provision in the schedule and the apparent difference between what appears in sects. 21 and 22 and Sched. III, Part V. I think that it must be observed that Sched. III, Part V, begins as follows : C

(1) Subject to the provisions of any enactment (including any enactment in this Act) all acts of a local authority and all questions coming or arising before a local authority shall be done and decided by a majority of the members of the local authority present and voting thereon at a meeting of the local authority. D

Subpara. 2 provides as follows : E

In the case of an equality of votes the person presiding at the meeting shall have a second or a casting vote. F

However, sects. 21 and 22 of the Act are themselves provisions of that very Act of which Sched. III, Part V is said to be part, and Sched. III, Part V is a general provision expressly made subject to the very provisions in the Act which are to be found in sects. 21 and 22. Sects. 21 and 22, read with sect. 17, form the complete legislative provision governing the election of aldermen to the council, and they are particular and special, and intended to be dealt with as particular and special, and, looked at in that way, they cannot be said to be contradictory of Sched. III, Part V, which is expressly said to be subject to those particular provisions. G H

Looking at the matter historically—that is to say, looking back to the previous Acts, and the situation which arose under those previous Acts, and the decisions under those Acts—I do not think that there is anything inconsistent with the interpretation which we are giving to these sections of this Act. Under the earlier Acts, it is true that the Municipal Corporations Act, 1882, s. 60 (3), provided that an outgoing alderman, although mayor elect, should not vote, and those words were so framed that in the *Bridport Case*, *Hounsell v. Suttill* (1), the case of a Bridport election, MATHEW, J., said that it was invalid because he came to the conclusion [p. 501] :

... on the plain language of the Municipal Corporations Act, 1882, s. 60, which provides by subsect. (2) that the election of aldermen shall be held “immediately after the election of the mayor”; and by subsect. (3) that “an outgoing alderman, although mayor elect, shall not vote.”

He held that those words were too plain, and that, although an alderman had become mayor elect, none the less he was still an outgoing alderman, and he could not vote as mayor elect. That seems to me to indicate that quite clearly the prohibition under that statute was absolute on any outgoing alderman. However, the Municipal Corporations Amendment Act, 1910, s. 1 (2), repeals the Municipal Corporations Act, 1882, s. 60 (3), and sect. 1 (1) provides as follows :

An alderman of a municipal borough shall not, as such, vote in the election of an alderman of the borough, and an outgoing alderman shall not, as alderman, vote in the election of mayor.

If it had been intended to make an absolute prohibition of anybody who was an alderman, as long as he was an alderman, notwithstanding that he held an office such as that of mayor, it would have been the simplest thing in the world to remove the word “outgoing” and to say :

An alderman of a municipal borough shall not vote in the election of an alderman of the borough.

Parliament, however, did not do that. Those words in the 1910 Act first appeared quite clearly in the Local Government Act, 1888, which dealt with county councils. Nevertheless, Parliament in the 1933 Act did not absolutely exclude an alderman from voting at the election of an alderman, but only excluded an alderman voting “as such.” That seems to me to contemplate quite clearly that he may have a vote in a capacity other than that of alderman. In other words, “as such” are words of limitation upon his power of voting, not words of exclusion. He must not vote in his capacity of an alderman at large, but, if he has another capacity entitling him to vote under the Act, he is left the right to vote in that other capacity.

I do not think that it would be right to give to a subsection, which is depriving an alderman of a right which would otherwise be his by virtue of sect. 17 and the early part of sect. 21, a reading wider than that which the words require, and the words only require us, if he has exercised a vote as an alderman, to say that that vote is invalid. Here, however,

as I have said at the opening of my judgment, there is not only no language to indicate that he purported to exercise his vote as an alderman, but also the assumption must be that he cast his vote as mayor, and, casting his vote as mayor, he did not cast it as an alderman. In those circumstances, I myself am unable to accede to an argument which seems to me to involve extending the effect of sect. 22 (2) and making it absolute, whereas, not being absolute in its terms it is only a qualified exception from the right to vote. In those circumstances, I agree. A

Election valid. Costs to be paid by petitioners.

Solicitors : *King, Wigg & Brightman*, agents for *J. A. Dixon & Son*, Gateshead (for the petitioners) ; *Bell, Brodrick & Gray*, agents for *R. R. Crute & Son*, Newcastle-upon-Tyne (for the respondents). B

[Reported by F. HONIG, Esq., Barrister-at-Law.]

Re CROSSMAN, SALAMAN v. CROSSMAN. C

[CHANCERY DIVISION (Farwell, J.), April 24, 1939.]

Lien—Equitable lien—Purchase of shares—Money advanced by father to son—Arrangement for repayment out of dividends. D

In 1931, the bankrupt purported to purchase 113 shares in a private company. For this purpose, he borrowed from his father £24,900. By arrangement with the father, the dividends on these shares were to be applied as follows, (a) in paying the interest on the borrowed money, (b) in paying the sur-tax assessed upon the son by reason of the receipt of the dividends and (c) in paying off the loan. The shares were lodged with the father's bank as security for the purchase price, which was borrowed from the bank. In 1934, the shares were released by the father's bank and lodged with the son's bank as security for an overdraft. In 1938, this overdraft was paid off by the father, and as part of the transaction the father insisted on receiving the shares :— E

Held : these facts showed an intention by the parties that there should be an equitable lien on the shares for the amount of the purchase price, and the father was entitled, as against the trustee in bankruptcy, to retain the shares until all sums secured by the equitable lien were satisfied. F

[EDITORIAL NOTE.] A person who has expended money on property placed in the name of another obtains no equitable lien upon the property unless it can be clearly shown that there was an intention on the part of both parties that the property should be equitably charged with the money so expended upon it. Here the transaction in fact was one in which the income of the property was to be applied for the reduction of the loan, subject to an arrangement in respect of the sur-tax of the borrower. In addition to this, the subsequent dealings with the shares show that the lender treated the shares as charged with the repayment of the money advanced. These circumstances are held to be sufficient to establish an equitable lien. G

As to EQUITABLE LIEN, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 567-580, paras. 714-733 ; and FOR CASES, see DIGEST, Vol. 32, pp. 265, 266, Nos. 476-482.] H

MOTION by the trustees in bankruptcy of Geoffrey Mark Crossman against the respondent, Douglas Crossman, his father, for a declaration

that the trustee in bankruptcy is entitled to the benefit of 113 ordinary shares of £100 each in Mann, Crossman & Paulin, Ltd., now or recently standing in the name of the bankrupt, subject only to a charge in favour of the respondent, for securing a sum of £5,448 5s. 11d., and for relief by way of delivery up of the certificates of the shares. On behalf of
A the respondent, it was contended that he had a lien upon the shares, not merely for the £5,448 5s. 11d., which the trustee in bankruptcy admitted, but also in respect of a further sum of £22,000 odd, making a total sum of £28,000 odd.

H. J. Wallington, K.C., and W. A. L. Raeburn for the trustee.

B *W. P. Spens, K.C., and J. H. Stamp* for the respondent.

FARWELL, J.: The transactions which are in question here arise in the following circumstances. In 1931, owing to the death of one of the shareholders in the company, certain shares became available and
C could be purchased by the respondent, Douglas Crossman. Those shares amounted in number to 180. The respondent could, if he had chosen, have taken up those 180 shares himself, but that was not the way in which the matter was carried out.

The solicitors for the respondent and for the bankrupt, Geoffrey Mark
D Crossman, the respondent's son, at that time were Crossman, Block & Co., and one of the partners, Mr. Block, dealt with the matter. The matter was entirely a friendly one between the father and the son, and the arrangement which was reached is set out in a letter of June 1, 1931, written by Mr. Block to the respondent :

E The following is the proposal which I put up to Mark [the bankrupt] on Friday, and which, subject, of course, to your approval, he is readily prepared to accept :
(1) Your full allotment of Sir William's 600 shares is 180. (2) Of these I suggest 67 should be taken up by you, thus making your total holding 2,350—a round number.
(3) That the balance—113 shares—should be taken up by Mark. (4) That you should lend him the £24,900, which in round figures is the amount that will have to be paid for these 113 shares. (5) That the whole of the dividends to be derived
F from these 113 shares should be allocated as follows : (a) In paying to you the interest that you will pay on the moneys that you may borrow for the purpose of purchasing these shares or in the event of your finding the cash yourself then in paying you interest at 5 per cent. on the money you lend Mark to buy the shares.
(b) In paying the sur-tax which Mark will have to pay on the dividends on these shares, in his hands, including any increase on his present income by reason of increased rate on his higher income. (c) In paying off the loan on the shares. You
G will gather that under this arrangement Mark will take no part of the dividends on these shares until the shares are wholly paid for, but in the meantime, he will not, by reason of the purchase of these shares, be any worse off than he is at present. The advantages of this proposal are : (1) That the dividends will escape the higher rate of sur-tax that they would be liable to in your hands. (2) That the value of these shares will not be part of your estate, and will thus avoid heavy death duty, for which they would be liable as part of your estate.

H Then there is a reference to the bankrupt's will, which I need not read. On June 4, 1931, Mr. Block wrote to the bankrupt as follows :

I send you copy of a letter which I wrote to your father following the interview I had with you last Friday. Your father told me at the brewery to-day that he is quite prepared to agree to the suggestions contained in my letter, and if you will let me hear from you that they are acceptable to you, I will take steps to carry out the matter on those lines.

That being the arrangement, so far as the 113 shares were concerned, it was carried out in this way. The respondent borrowed from his bank, the Westminster Bank in the City, a sum sufficient to pay for the 113 shares. The shares were purchased in the name of the bankrupt, and, by arrangement between the father and the son, were lodged with the Westminster Bank to secure the amount of the loan which the father A had obtained from the Westminster Bank, and for which he was, no doubt, liable to the bank as surety. The dividends were applied in accordance with the terms of the letter of June 1.

Matters remained in that state until the beginning of 1934. By that time, the amount due to the bank in respect of the loan had been somewhat reduced, and the respondent himself, out of his own moneys, had paid off the amount still owing to the Westminster Bank and obtained the certificates which the bank had held as security for the loan to the father, or rather the certificates were obtained for him by his solicitor, who retained them on his behalf, and applied the dividends, as and when received, in accordance with the arrangement which had been made. C That condition of affairs continued until later on in 1934. In or about August or September, 1934, the son, the bankrupt, had got himself into very serious financial difficulties. Among other liabilities for which he was liable was the sum of £10,800, which represented the overdraft which he had with Barclays Bank at Royston. The son D appealed to his father for help, and an arrangement was then made under which the father consented to the 113 shares in question being deposited at Barclays Bank at Royston as security for the son's overdraft. However, the solicitor on behalf of the father made it quite E clear, both to the bank and to the son, that, by permitting that deposit of the shares at Barclays Bank, the father was only releasing whatever charge he had on the shares in respect of the money he had borrowed and had to pay, so far as was necessary to allow Barclays Bank to have a first charge. It is quite plain, from the letters which were written F by the solicitor to Barclays Bank, that that was the clear understanding upon which the shares were to be deposited as between the parties. The term used by the solicitor was that the father was willing "to uplift his lien" in favour of Barclays Bank for the purpose of securing this overdraft. Under that arrangement, the shares were deposited G with Barclays Bank, and the son executed an ordinary charge in a case of that sort, by which the overdraft and the further money lent were to be secured by shares of that nature, and the transaction was completed in that way. The dividends were applied in paying off the overdraft at Barclays Bank, and the certificates were deposited H with the bank. That is to say, the father, who, through his solicitor, had the certificates in his control, authorised their being handed over to Barclays Bank under the arrangement which had been made to secure the son's overdraft. In 1938, the son was still in serious difficulties, and the father paid off the amount owing to Barclays Bank, thus

obtaining the handing over of the shares from Barclays Bank to himself. He took a receipt from Barclays Bank in a form which amounted to the assignment to him of the amount which he had paid to the bank to discharge the son's overdraft. On Feb. 11, 1938, a receiving order was made against the son, and on Mar. 4 he was adjudicated bankrupt.

A The applicant was appointed his trustee in bankruptcy. Those are the whole of the circumstances which I have to consider in determining the rights of the parties herein.

On the one hand, the trustee says that the father never had any lien which he can now enforce upon the shares in question over and above the £5,400 odd which he admits, and is bound to admit, that the father has to have by reason of the receipt and assignment to himself. He claims that part of the bankrupt's estate consists of the shares in question, and that he is entitled to delivery up to himself of the necessary certificates, subject to his paying the £5,400 odd. On the other hand, the

C father contends that he has, and always has had, a charge on the shares in question for the whole amount which he has had to pay in respect of those shares. Therefore, he claims that he is not under any obligation to deliver the shares unless and until he is paid the sum of £28,000 odd.

The question really turns on what was the result of the transaction

D in June 1931. If in fact there was a charge on the shares in the father's favour at any time, except so far as there was a charge when the father paid off Barclays Bank, it was a charge which was created in the first transaction in June, 1931. It is necessary, therefore, to consider a little carefully what the effect of that transaction was in fact. It cannot be dis-

E puted, and it has not been disputed by Mr. Wallington, that an equitable charge may arise when there is or was an intention that there should be such a charge. The actual form of the letter or other charge is wholly immaterial, but it is essential, for the creation of an equitable charge, that there should have been an intention to create such a charge on

F the part of the parties, both the chargee and the chargor. Mr. Wallington says that it is impossible, on the transaction as it is recorded in the letter of June 1, 1931, and in so far as it can be ascertained from the evidence, to say that there was ever any equitable charge. The money

G in question was money which the father borrowed from his bank and gave to the son, or which he allowed the son to have for the purpose of purchasing the shares, and, although it may be that, as between the father and the son, the son owed his father for the amount so provided, there is nothing which can be said to create such an equitable charge as is claimed in this case. There can be, I think, no suggestion that

H there is any legal charge, except to the extent of £5,000 odd. On the other hand, it is said on behalf of the respondent that, when one reads this letter, and bears in mind the transactions which took place, and as they are recorded in this letter, it is clear that there was an intention on behalf of the father and the son that there should be created in favour of the father an equitable charge upon the shares in question, so that

the father could recover, under such equitable charge, the amount which he had expended, or had to expend, for the purpose of procuring the shares for the benefit of the son.

When one reads the letter of June 1, it is not very easy at first glance to see what the real intention of the parties was, except to this extent. It is clear that the father was to borrow, or himself provide, the money necessary to purchase the shares, and that those shares, when purchased, were to be put in the name of his son. Further, it is clear, I think, that the intention of both parties was that, by the father's so acquiring the shares in the name of the son, the son should not suffer any diminution in his income as a result of the transaction. That was clearly intended, I think, from the provision made with regard to sur-tax. Not only were the dividends to be applied to some extent in paying the sur-tax which Mark the son would have to pay on the dividends of the shares, but also any increase in the present rate which would be caused by the possession in law of the shares in question. I think that it is quite plain at any rate that the son was not to suffer from the transaction. On the other hand, so long as the money was outstanding, he was clearly not to get any benefit from the shares themselves, because the dividends were not to be received by him until the whole of the purchase price had been repaid. Therefore, the son was to be left in precisely the same position as before the shares had been purchased, so long as the loan—that is, the money which the father provided himself, or which he borrowed from his bank for the purpose—remained outstanding. That is the effect of the transaction, as it appears from the letters. Is the result of that that there was a clear intention on behalf of the father and son that the father should have a right to look to the shares themselves for the purpose of recouping to himself the money which he himself found, or which he found through his bank, for the purpose of paying for the shares in question? When one looks at the letter as a whole, and considers the transaction as it actually took place, I myself can feel no doubt that there was, and there is now, an equitable charge in favour of the father on these shares in question. It is plain, in my view, that the son never intended, and the father never intended, that the son should get any benefit from these shares until the money which had been provided by the father for the purchase of the shares should have been fully repaid. When the shares were deposited by the son, in accordance with the arrangement, under the direction of the father, with the Westminster Bank, the father, subject to the Westminster Bank's charges, was entitled, in my judgment, to hold the shares. He was entitled to an equitable lien on the shares, representing the money which he had found by himself, or through the loan of the bank. That was made manifest when the second transaction took place, when the father paid the balance of what was due to the Westminster Bank and the shares were handed over to him. He retained them until the third transaction, when the shares were handed over to Barclays Bank as

security for the overdraft of his son. The transaction was carried out, however, under terms which made it manifest that the father was preserving the equitable charge which he had, and was only releasing it for the purpose and to the extent necessary to enable Barclays Bank to obtain priority. In my judgment, although it is quite true, as Mr.

A Wallington has contended, that this is not the case of a legal lien, taking the transaction as a whole, as I have said, I cannot doubt myself that the parties did create in favour of the father an equitable lien for the amount which the father had had to pay in respect of these shares. In these circumstances, in my judgment, the view which the respondent

B has put before the court is the right one, and I will make a declaration accordingly.

Solicitors : *Woolfe & Woolfe* (for the trustee) ; *Crossman, Block & Co.* (for the respondent).

C [Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

COTTLE v. COTTLE.

D [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Bucknill, J.), April 20, 1939.]

Magistrates—Bias—Justice acquainted with mother of one party—Party stating before proceedings that this justice would “put the defendant through it.”

E On a summons before justices alleging desertion by the husband, it appeared that the chairman of the bench was a friend of the wife's mother. At the commencement of the hearing, the husband, who appeared in person, took objection to the case being tried before a court presided over by this chairman, but the chairman overruled this objection, saying that he had no knowledge of this case, but that he did know about a previous case, which was tried when he was not on the bench. Thereupon, the hearing proceeded, the husband cross-examining his wife, and giving evidence himself. It was proved that

F the wife had said that she would obtain a summons to be set down for hearing when this particular justice was presiding, and that he would “put him [the husband] through it.” It was contended that the proceedings must be set aside on the ground of bias :—

G HELD : (i) it was not necessary to show that the justice was in fact biassed, and there was here sufficient evidence upon which the husband might reasonably have formed the impression that this justice could not give this case an unbiassed hearing. The case must, therefore, be remitted for a new trial before a bench of which this justice was not a member.

(ii) there had been no waiver of the objection on the ground of bias.

H [EDITORIAL NOTE. It is said to be one of the features of the administration of justice by local justices that they receive some help in their work from their knowledge of local conditions and of the history of the people who come before them, and that this can form no foundation for a suggestion of bias. Here, however, one of the parties is alleging that her acquaintance with the justice is such that he will be inclined in her favour. Without any suggestion that the justice would be so inclined, that is sufficient to establish bias in the legal sense, since the necessity is not to prove actual bias, but to prove that the position is such

that the other party cannot reasonably form the impression that his case **may** not be given an unbiased hearing.

AS TO BIAS OF JUSTICES, see HALSBURY, Hailsham Edn., Vol. 21, pp. 541, 542, para. 958; and FOR CASES, see DIGEST, Vol. 33, pp. 292-301, Nos. 83-157.]

Cases referred to :

- (1) *R. v. Sussex JJ., Ex p. McCarthy*, [1924] 1 K.B. 256; 33 Digest 294, 97; A 93 L.J.K.B. 129; *sub nom. R. v. Hurst, Ex p. McCarthy*, 130 L.T. 510.
- (2) *R. v. Essex JJ., Ex p. Perkins*, [1927] 2 K.B. 475; Digest Supp.; 96 L.J.K.B. 530; 137 L.T. 455.
- (3) *R. v. Salford Assessment Committee, Ex p. Ogden*, [1937] 2 K.B. 1; [1937] 2 All E.R. 98; Digest Supp.; 106 L.J.K.B. 344; 156 L.T. 474.

APPEAL by a husband from a decision of the Bath justices adjudging him guilty of desertion. The facts are fully set out in the judgment of SIR BOYD MERRIMAN, P.

R. H. T. Whitty for the appellant.

The respondent was not represented and did not contest the appeal. C

SIR BOYD MERRIMAN, P. : This is a case of some public importance. It is an application by a husband, on the ground that the chairman of the justices was—or at any rate might appear to be—biased in the hearing of the case.

It is, I think, of some importance in the first instance to consider the nature of the case which was made against the husband. The parties were married in Oct., 1936, and by Sept., 1937, there had arisen matrimonial differences of so acute a nature that the wife left her husband in that month and took out a summons against him for desertion and neglect to maintain. It is obvious that, in the circumstances, the charge of desertion could only be based, if there was any substance in it, upon the allegation that it was some misconduct of the husband which had driven the wife herself to leave the matrimonial home. That summons came on before the Bath justices on Oct. 4, but it was not heard, because the justices, very rightly and wisely, adjourned the case in order that the parties might make up their differences, and that, in fact, occurred. On the same day, or at any rate within a very short time, the wife returned to the husband, and, when the day of the adjourned hearing came, asked that the summons might be withdrawn by consent. On that occasion, the chairman of the justices was a different member of the bench from the one who presided on the occasion to which I am shortly going to refer, nor was the chairman on the subsequent occasion a member of the bench on this first occasion. In Feb., 1939, the wife again left her husband, and on Feb. 20 she took out another summons against him on the grounds that, as from the date on which she had left home—namely, Feb. 18—the husband had deserted her, and that on divers dates before that he had been guilty of persistent cruelty. I have referred to the nature of the charge for the reason that it is quite plain that it is impossible to divorce the issues of fact which would be

raised on that summons from those which would inevitably have been raised had the original charge of desertion been fought out.

The substance of the matter was that the case was such that the wife, by the conduct which she alleged was the persistent cruelty of her husband, had been driven to leave him on the second occasion, as she
A had been driven to leave him on the first. In other words, the charge of desertion on the second occasion was necessarily and intimately bound up with the charge on the first occasion. In fact, on the second occasion, according to the history of the charge and the findings, the justices found that he had been guilty of desertion, but did not find that he had been
B guilty of persistent cruelty. There is, of course, no inconsistency between the two findings. It is sufficient to say that they must be taken to have found that the husband's conduct had been such as to drive the wife away from the matrimonial home and thus make the husband the deserter.

C On the second occasion, the chairman of the bench was Mr. Percy Browning, who was sitting with two other justices. On the case being called on, the husband, who was conducting his own case, and who stated expressly that he did not admit the charge, made an application that the case might be adjourned until a later date on which the magistrate who
D had been presiding on the former occasion would be in the chair, saying that he would like him to try it again. To that request the clerk to the justices very properly replied that it was not for the party to select his own particular day or his own particular chairman. Thereupon the husband took specific objection to Mr. Browning sitting as chairman.
E He was asked what his ground was, and, according to the shorthand note with which we have been provided, he said that his wife had said on the last summons that, if he came to court again, she would get a summons from Mr. Browning, who would put the husband through it. The chairman then said :

F I do not uphold the objection. I took an oath when I was appointed a magistrate to do justice, and I have always endeavoured to. I do not know anything about this case, and I did not consult your wife about it. I knew about the previous case, but I did not know anything about this case until the Monday morning when your wife came to ask for a summons. I do not see any justification at all for my vacating the chair. I think it is a frivolous objection.

G The defendant thereupon said : " Well, I don't, sir." The clerk said : " The magistrates have decided to proceed." The defendant said : " In that case I refuse to answer any questions put before me. I shall pay no attention to the charge." The objection, good or bad, was taken as plainly as any objection could be taken, and it is impossible to impute
H to the husband any standing by and waiving his rights. It is true that later he did take part in the case. He did cross-examine the wife. He did give evidence himself. We are not discussing, and we have not even read, the evidence given on the merits. That is not the point of this case at all. When once a point like this has been taken and has been over-ridden, and the justices have decided to go on with the case, I think that

it would be contrary both to reason and to authority to hold that, by joining in the discussion of the case, or giving evidence in the case, the party who has taken the objection had in any sense waived it. Therefore, whatever his rights were at the time, those rights still avail him.

Before I consider, as I shall have to consider in one moment, certain affidavits which have been put before us, and put before us after having A been served, not only upon the clerk to the justices, but also upon the wife, who has not appeared here to answer, it is important to consider a little more closely the passage which I have just read from the chairman's statement. He said :

I do not know anything about this case, and I did not consult your wife about it. B I knew about the previous case . . .

It is true that he does not say : " and I did consult your wife about that." I do not wish to take the statement one iota beyond its face value. It does say : " I knew about the previous case." He did not know about it as one of the justices who had taken part in it, and I have said enough C about the intimate connection between the two cases to make it clear, I hope, that, though there were two summonses severally alleging desertion, the case in substance was the same case, or perhaps, to put it more accurately, was two chapters of the same case, the first chapter of which was common to both summonses. If the magistrate was making any D distinction in his mind between the first case and the second case as if they were two separate and distinct cases, he was making an entirely false distinction. There is his first statement made in public in answer to this objection—that he had known about the first case.

It is necessary to couple with that the evidence which is given in these E affidavits. On taking this objection, the husband had said that on the former occasion the wife had said that, if he came into court again, she would get a summons from Mr. Browning " and he would put me through it." I emphasise that, not because it imputes anything to Mr. Browning, but because, if that was the wife's attitude towards that particular F justice—that in some way or another she would be able to influence Mr. Browning (though it is no fault of Mr. Browning's that anything of the sort should be said) it does at least make it impossible for the wife to complain if the husband was under the impression that Mr. Browning was likely to be biassed in his wife's favour. I now turn to the affidavits. G I do not propose to read them all, but the husband himself says as follows :

Before she left, my wife told me that she would " get me " as she would summon me before the magistrates again and she would set the case down for hearing on a Monday when Mr. Percy Browning would be in the chair and he would " put me through it " as he was a friend of her mother.

In the next paragraph, he refers to the friction which had occurred in H their married life, which friction was—according to the husband's affidavit, I am expressing no opinion whatever upon the merits of the matter—due to the interference of his mother-in-law. According to this paragraph in his affidavit, he says :

My wife also frequently referred to Mr. Percy Browning during our married life

and before any trouble arose between us and whenever she mentioned his name she told me that her mother was friendly with Mr. Browning. Her mother also told me on several occasions that she was friendly with Mr. Browning and that he had advised her on certain matters.

A I hope it goes without saying, if some attempt was made technically to argue this point, that, because of the mere fact that some sort of acquaintance exists between a justice and parties, or even the fact that they have discussed business matters entirely unconnected with the case, it would be a preposterous thing if a suggestion were to be made that there was bias, or a possibility of bias. If we were to put any such exacting test upon the right of justices to sit, it might very well be that the whole structure of summary jurisdiction would be upset. The whole essence of the local administration of justice and the great value of the functions of justices are that they do administer justice amongst people with whom they are acquainted, and of whose lives and family history they know something. I must not be taken for a moment to be suggesting that anything of that kind could possibly be regarded as a disqualification. In this case, however, the suggestion is that the acquaintance was much closer than that, and, indeed, in another affidavit, sworn by the sister of the husband, there occurs the following passage :

D In March, 1938, my sister-in-law [the wife] called to see my mother and me and informed us that a quarrel had arisen between her and her husband. We arranged to go down with her to see my brother and I walked down with her. On the way down we met my sister-in-law's mother who approached us and spoke to us. My sister-in-law then told her mother about the trouble stating that her husband had objected to the interference from his mother-in-law. My sister-in-law's mother then said : " Don't stand any messing about like this. Go down and see Mr. Browning. You know he is a friend of mine. He will have him on the bench and put him through it."

E Then the sister adds :

On several occasions my sister-in-law told me that she did not intend to have any nonsense with her husband and that she would bring him up in front of Mr. Browning who would put my brother through it.

F As I said before, the wife, at any rate, is the last person who is entitled to complain if the husband suspected that Mr. Browning would be unable to give an unbiassed hearing to his wife's complaints. There is, in addition, other evidence, to which I do not attach very great importance, that the parties, the mother-in-law, and Mr. Browning, had actually been seen conversing in an animated manner in public at about the time when the present summons was issued. I do not attach any importance to that, because I am not intending to express any opinion on the question whether or not Mr. Browning was biassed in this matter, or to assume that his judgment on the occasion in question was influenced by any discussions which he may or may not have had with members of the wife's family. That is not the point. As LORD HEWART, L.C.J., said, by no means for the first time, in *R. v. Sussex JJ., Ex p. McCarthy* (1), after accepting that the justices' clerk, whose bias in that particular case was said to affect the validity of the decision of the justices, abstained from

interfering² in any way during the consideration of the case in the justices' private room [p. 259]:

But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.

That principle, about which there can be no dispute, was carried, if not A
a stage further, at any rate a stage nearer to this particular case, in
R. v. Essex JJ., Ex p. Perkins (2), a case which, I may say in passing,
has quite recently, in *R. v. Salford Assessment Committee, Ex p. Ogden* (3),
received the approval of the Court of Appeal. *R. v. Essex JJ., Ex p.* B
Perkins (2) was a case in which the presence of a solicitor, the clerk to
the justices, at the hearing could possibly have had an influence on the
tribunal, and was said to vitiate the proceedings because some years
before a clerk of his, at a separate office, had advised the wife about
that stage of her matrimonial affairs. At a later stage, when it was
before the justices, it was proved and accepted as proved that the solicitor C
himself, the clerk to the justices, had no knowledge whatever of the fact
that his clerk had on this former occasion advised the wife. Indeed,
the only trace of the possibility of the solicitor's having any such know-
ledge was the fact that a report of the case had appeared in a weekly
report. In other words, it was the plainest possible case in which the D
administration of justice was not interfered with in any way by any
actual bias on the part of the clerk. Nevertheless, the order made by
the justices in favour of the wife was removed on *certiorari* by a Divisional
Court of the King's Bench Division, and, in dealing with the matter,
AVORY, J., after quoting a passage from the judgment of LORD HEWART, E
L.C.J., in *R. v. Sussex JJ., Ex p. McCarthy* (1), said, at pp. 488, 489:

The only difficulty here arises from the fact that the clerk to the justices has stated
on affidavit that at the time when the summons was heard he did not in fact know
that his firm had acted for the applicant's wife. If we had to consider whether or
not he was in fact biased, that statement would be most material. We have
here to determine, however, whether or not there might appear to be a reasonable
likelihood of his being biased. If there might, then justice would not seem to the F
applicant to be done, and he would have a right to object to the clerk acting as such.
I must conclude that, though the clerk to the justices and the justices did not know
that his firm had acted for the applicant's wife, the necessary, or at least the reason-
able, impression on the mind of the applicant would be that justice was not being
done, seeing that the solicitor for his wife was acting with the justices and advising
them on the hearing of the summons which she had taken out against him.

The order was made in that case, notwithstanding that no objection had
been taken at the time. I need not deal further with that point. Before
parting from that case, I shall quote one short passage from the judgment
of SWIFT, J., because that passage seems to have found special approval
in the subsequent case in the Court of Appeal to which I have referred. H
After quoting the passage which I have already read from the judgment
of LORD HEWART, L.C.J., in *R. v. Sussex JJ., Ex p. McCarthy* (1), SWIFT,
J., said, at p. 490:

Might a reasonable man suppose that there had here been such an interference
with the course of justice? I agree that he might, and I therefore think that this

rule *nisi* should be made absolute for a *certiorari* to remove the order of the justices into this court with a view to its being quashed.

It will be observed that both AVORY and SWIFT, JJ., took the test that the impression might reasonably be caused on the mind of the applicant that he was not having a fair trial. As I have said already, I am not imputing, or thinking of imputing, to Mr. Browning any bias in fact, but, applying the principles of these cases, it seems to me impossible to resist the conclusion that this particular husband might reasonably have formed the impression that Mr. Browning could not give this case an unbiassed hearing. That is enough for our decision. In those circumstances, I think it is inevitable that this case should be remitted to the Bath justices in order that it shall be dealt with by another tribunal of which that particular justice is not a member.

BUCKNILL, J. : This case does present some considerable difficulty to my mind. I wish to emphasise what SIR BOYD MERRIMAN, P., has himself said—namely, that, in my view, on the facts, no moral blame of any kind attaches to the chairman who heard the case. That is not the test which we have to apply. The test which we have to apply is whether or not a reasonable man, in all the circumstances, might suppose that there was an improper interference with the course of justice if Mr. Browning sat as chairman. That is a very difficult question to answer. It is made no easier by reason of the fact that the wife has not seen fit to answer any of the affidavits put in by the husband and is not here to-day to resist this application, and it seems to me, therefore, not unfair that we should accept the statements in the affidavits as correct.

There is one statement of great importance which the wife might easily have denied by affidavit, but which she has not done. It is in the husband's affidavit, where he says that, before she left, two days before the summons was taken out :

... my wife told me that she would " get me " as she would summon me before the magistrates again and she would set the case down for hearing on a Monday when Mr. Percy Browning would be in the chair and he would " put me through it " as he was a friend of her mother.

That statement has gone unchallenged, and, as it happened, the summons was taken out, and it did come before Mr. Browning. When the husband asked, not unreasonably, that the case might be dealt with by the chairman who had heard the earlier summons, and who had suggested a reconciliation, and taken a view which led to the summons being withdrawn by the wife, that application was refused, and the case had to go on before Mr. Browning. I find it impossible to say that no reasonable man could suppose, in the circumstances, that there was an improper interference with the course of justice. I attach, as everybody must attach, the greatest importance to the fact that every litigant in a British court of justice should be satisfied that he is having an absolutely impartial trial, and that there should be no suspicion of any undue interference. That being so, although, as I have said, I think that the case is a difficult

one, I agree with SIR BOYD MERRIMAN, P., that this case should go back for retrial, as asked.

Case remitted to the justices to be dealt with by other members of the panel.

Solicitors: Church, Adams, Tatham & Co., agents for Carpenter & Carpenter, Bath (for the appellant).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

METCALFE v. LONDON PASSENGER TRANSPORT BOARD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and du Parc, L.JJ.),
April 26, 27, 1939.]

Master and Servant—Common employment—Amalgamation of undertakings—Transport vehicles—Whether doctrine applies to transport vehicles en route—Bus conductor injured by tram.

The plaintiff was a bus conductor who was injured as a result of a collision between his bus and a tram, due to the negligence of the tram driver. Both the plaintiff and the tram driver were in the employ of the London Passenger Transport Board, and it was contended that the doctrine of common employment applied. The plaintiff had been in the service of the London General Omnibus Co. before that company was absorbed in the London Passenger Transport Board:—

HELD: there was no implied term in the contract of employment that, where two of the defendants' vehicles were proceeding independently through the streets, the plaintiff had placed himself, with regard to the negligence of a fellow-servant, in a position different from that with regard to the negligence of any other driver. The doctrine of common employment did not apply to this case.

Decision of MACNAGHTEN, J. ([1938] 2 All E.R. 352) reversed.

[EDITORIAL NOTE. The reversal by the House of Lords of the decision of the Court of Appeal in *Radcliffe v. Ribble Motor Services, Ltd.* (1) is the real cause for reversing the judgment of the lower court in this case. As the matter stood at the time of the trial in the court of first instance, it was governed by the decision of the Court of Appeal in *Radcliffe's* case (1). The matter is not approached from the point of view that the position of the employees of an undertaking amalgamating many previously existing undertakings is in any way different from that of an ordinary employee, although it is not said that an argument based on that view would be without substance. The decision is based, as was that in *Radcliffe's* case (1), on the view that the accident arose out of a general risk of the highway, and not a specific risk of a fellow-servant's negligence.

AS TO COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 211-217, Nos. 1744-1789.]

Cases referred to:

- (1) *Radcliffe v. Ribble Motor Services, Ltd.*, [1938] 2 K.B. 345; [1938] 1 All E.R. 71; Digest Supp.; 107 L.J.K.B. 209; 158 L.T. 124; *reversd.*, [1939] 1 All E.R. 637; 160 L.T. 420.
- (2) *The Petrel*, [1893] P. 320; 34 Digest 213, 1757; 62 L.J.P. 92; 70 L.T. 417.
- (3) *London County Council v. A.-G.*, [1902] A.C. 165; 13 Digest 366, 994; 71 L.J.Ch. 268; 86 L.T. 161.
- (4) *Bartonshill Coal Co. v. McGuire* (1858), 3 Macq. 300; 34 Digest 126, 972; 31 L.T.O.S. 258.

(5) *Hutchinson v. York, Newcastle, & Berwick Ry. Co.* (1850), 5 Exch. 343; 34 Digest 207, 1697; 19 L.J.Ex. 296; 15 L.T.O.S. 230.

(6) *Burr v. Theatre Royal, Drury Lane, Ltd.*, [1907] 1 K.B. 544; 34 Digest 210, 1728; 76 L.J.K.B. 459; 96 L.T. 447.

(7) *Coldrick v. Partridge, Jones & Co., Ltd.*, [1910] A.C. 77; 34 Digest 211, 1741; 79 L.J.K.B. 173; 101 L.T. 835.

A (8) *Morgan v. Vale of Neath Ry. Co.* (1865), L.R. 1 Q.B. 149; 34 Digest 212, 1750; 35 L.J.Q.B. 23; 13 L.T. 564.

APPEAL by the plaintiff from a decision of MACNAGHTEN, J., dated Apr. 1, 1938, and reported [1938] 2 All E.R. 352. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

B Sir William Jowitt, K.C., and Montague Berryman for the appellant.

Gilbert Paull, K.C., and N. R. Fox-Andrews for the respondents.

Jowitt, K.C. : In *Radcliffe v. Ribble Motor Services, Ltd.* (1), the House of Lords laid down the doctrine of common employment in a way which
C concludes this case. It was decided that the basis of the doctrine of common employment rests upon implied contract, and that it must be found that the nature and circumstances of the contract are such as will enable the implication to be made. In the present case, there was not a contract at all. The appellant was employed by the London General Omnibus
D Co., and was automatically transferred to the services of the respondents by the London Passenger Transport Act, 1933. That Act provides that the terms of the new employment are not to be less favourable to the employees than were the terms of the old employment. The question arose, therefore, as to whether or not there could be the implication.

E It is not necessary for me to rely upon this point, because the decision of the House of Lords is conclusive. Where the negligence of one workman will not normally injure another workman, the doctrine of common employment will not operate at all. The doctrine had been put on the basis of an implied contract by the workman to take the risk
F of a fellow-workman's negligence, for which his wages are supposed to be a sufficient compensation. The authorities are so fully reviewed in *Radcliffe v. Ribble Motor Services, Ltd.* (1) that there is no necessity to refer to them. In the present case, one has two entirely distinct departments. One is the bus department and the other is the tram

G department. They are both owned by the London Passenger Transport Board, but the two undertakings are quite different : *London County Council v. A.-G.* (3). Reference to the London Passenger Transport Act, 1933, shows that it was not really by contract that the appellant entered the service of the respondents. He was transferred by that

H Act. When he was a servant of the London General Omnibus Co., he would have been entitled to receive compensation if he had been injured by the negligence of a tram driver. It is said, on behalf of the respondents, that, by reason of the amalgamation, he is no longer so entitled. The doctrine of common employment does not apply within the streets of London at all, because between one driver and another

in the streets there exists no special relationship which enables one employee to say that his safety is specially dependent upon the skill or negligence of another. As the accident was not caused by the driver of the bus on which the appellant was employed, but by the negligent act of another driver, it is a mere chance that it was the appellant who was injured, and the doctrine of common employment, therefore, does not apply. A

Paull, K.C. : One has to read *Radcliffe v. Ribble Motor Services, Ltd.* (1), in relation to the particular facts of that case, and the real principle underlying that case does not apply to the present case. In that case, it was held that the two drivers were not employed on common work in the sense which necessarily and naturally involved juxtaposition. B I reverse that, and say that, where the employment of one servant necessarily or naturally involves juxtaposition and exposure to the risk of the negligence of another, and the work in which they are engaged is common work, the defence of common employment is open to an employer if the negligence of one servant injures the other. The distinction C between *Radcliffe v. Ribble Motor Services, Ltd.* (1) and the present case is that, in the former case, at the time of the accident the two employees were engaged in work which did not necessarily or naturally involve their juxtaposition. In the present case, it was in the contemplation D of the plaintiff in carrying out his work that his bus would be dependent upon the skill of other employees of the respondents in driving the trams, so far as the bus route coincided with, or crossed, a tram route. Therefore, there was contemplation or supposition of a juxtaposition of him and other classes of employees. There is a distinction between a E casual meeting, as in *Radcliffe v. Ribble Motor Services, Ltd.* (1), and a regular meeting in the course of the employment. Where there is a particular bus service and a particular tram service, the employees on the buses will necessarily contemplate that the trams will be met frequently. F That was admitted in the evidence. In *Radcliffe v. Ribble Motor Services, Ltd.* (1), the coaches were being driven independently, and each driver could choose his own route. In the present case, the two men concerned were employed in the common work of carrying passengers from one part of London to another, just as in *Bartonshill Coal Co. v. McGuire* (4) G there was common work, although each of the employees in question was doing different work. In *Radcliffe v. Ribble Motor Services, Ltd.* (1), LORD WRIGHT said that there was no order or compulsion of the employer which brought the two men together at one place. The effect of the H transfer by statute was that the appellant was entitled to be in the employ of the respondents on the former terms and conditions. Because the legislature has said that the appellant shall be transferred, that does not mean that he shall be transferred without the usual implications of the contract applying. The contention that there is nothing in common between a tram driver and a bus worker is fallacious, as will be seen by reference to the London Passenger Transport Act, 1933, s. 3. The

Act assumes that there shall be one adequate and properly co-ordinated system of transport. The common work which was undertaken by the appellant and the driver of the tram was embodied in the common system carrying out the scheme contained in the Act. The cases show that the common work need not be identical work. [Counsel referred to

A *Hutchinson v. York, Newcastle & Berwick Ry. Co.* (5), *The Petrel* (2), *Burr v. Theatre Royal, Drury Lane, Ltd.* (6), *Coldrick v. Partridge, Jones & Co., Ltd.* (7), *Morgan v. Vale of Neath Ry. Co.* (8) and *Bartonshill Coal Co. v. McGuire* (4).]

- B SIR WILFRID GREENE, M.R. : This is an appeal from the judgment of MACNAGHTEN, J., who dismissed the plaintiff's claim upon the ground that it was barred by the application of the doctrine of common employment. At the time when the judge delivered his judgment, *Radcliffe v. Ribble Motor Services, Ltd.* (1), had been decided by this court, and, having
- C regard to that decision, the judge was constrained to decide the present case in the way in which he did. Upon the footing of that decision of this court, his judgment could not, I think, be criticised. That case, however, subsequently came before the House of Lords, and on Feb. 23, 1939, the decision of the House of Lords was given. LORD ATKIN,
- D LORD MACMILLAN and LORD WRIGHT were sitting, and in their opinions the foundation of the doctrine of common employment is examined afresh in the light of the principal authorities upon the subject, and the opinions contain an authoritative and exhaustive expression of the law. I shall not find it necessary in the course of the judgment
- E which I am delivering to endeavour to add to, or embroider, the opinions there expressed. To attempt to do so would be not only unnecessary but also highly undesirable, because, when a matter of principle has been so clearly gone into by the highest tribunal, no helpful purpose is served by a lower tribunal endeavouring to restate the principles there laid
- F down when it comes to apply them to a particular case. It may be, of course, that in some cases the principles may have to be examined in different language, or from a different angle. Fortunately, in the present case, I find myself clearly of the opinion that its facts bring it quite clearly within the principles there laid down.
- G In the present case, the facts quite shortly were these. Before the passing of the London Passenger Transport Act, 1933, the plaintiff was in the employment of the London General Omnibus Co. as a bus conductor. When the Act came into operation, he was transferred to the service of the London Passenger Transport Board, and continued to be
- H employed as a conductor of one of their buses. On July 2, 1937, his bus was being taken out in the evening, and he acted as its conductor. It started on its journey from Palmers Green garage to Kew Gardens, the route being No. 112. In the course of that journey, at numerous points the route crossed the line of other transport routes operated by the London Passenger Transport Board, some of them being bus routes,

some of them being Green Line coach routes, and some of them being tram routes and trolley bus routes. After leaving the Palmers Green garage, the route turned down Green Lanes, and for a distance of about 40 yds. ran down that thoroughfare, and afterwards turned down Bowes Road. In Green Lanes there are two lines of tram tracks, upon which run trams which, before the passing of the Act, had belonged to the Middlesex County Council, but which, since the passing of the Act, belong to, and are operated by, the London Passenger Transport Board. On the evening in question, the driver of the plaintiff's bus pulled up at the traffic lights which are in Green Lanes just before the entrance to Bowes Road. While the bus was stationary at that point, a tramcar, which was admittedly being driven in a negligent manner by another servant of the defendants, ran into the back of it and inflicted upon the plaintiff injuries of the most serious character. He brought his action, and, as I have said, the defence of common employment, which was the only defence insisted upon before the judge, was successful, and his action was dismissed. However, in order to save the expense of a further trial in the event of his decision being upset on appeal, the judge fixed the damages. The general damages he fixed at £3,500, while the special damage was agreed at £215.

The fact of this case which immediately leaps to the eye is that, at the particular place where this accident occurred, the plaintiff was exposed to the general risks of a public thoroughfare. He ran the risk of suffering injury by the negligent driving of any driver who happened to be there at any time. He was running the general type of risk at the hands of the general public which is run by everybody who proceeds along a public thoroughfare. Among the vehicles which he might expect in the normal course to find upon that thoroughfare were, of course, vehicles belonging to his employers. The question is whether or not the court is to find an implied term in his contract of service to the effect that he undertakes the risk of suffering through the negligence of the drivers of any of those vehicles, and to that extent agrees impliedly to put himself in a different position with regard to risk from the negligence of those drivers from the position in which he is in regard to risk of negligence from any other driver whom he may encounter in the course of his duties. The question whether or not the doctrine of common employment applies depends upon the question whether or not the appropriate term ought to be implied in the contract of service, and the answer to that question in turn depends upon all the relevant facts of the individual case.

It is always easy and tempting to construct imaginary cases in order to see whether they fall on the one side of the line or the other. I propose to consider only the facts of this individual case, and, upon the facts of this individual case, the circumstance which I have mentioned—as to the nature of the risk from all members of the public who might be there—is, in my view, one of great importance in deciding whether or not the inference ought to be drawn. I find in the decision

of the House of Lords in *Radcliffe's* case (1) complete guidance, and, to avoid running the risk of introducing obscurity into the matter, I propose not to state any principles in my own words, but to refer to two passages in the opinions in that case. The first is from the opinion of LORD ATKIN. He quotes a passage in the judgment of SIR FRANCIS JEUNE, P., in *The Petrel* (2). I read that because the reasoning contained in it is in terms adopted by LORD ATKIN. SIR FRANCIS JEUNE, P., said, at p. 326 :

The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services. Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other ? In some cases it might perhaps ; for example, it might if all the ships of the company were in the habit of meeting in the same dock, and the safety of each thus became in the ordinary course of things, dependent on the skill with which the other was navigated. But in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate ? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment.

His reference to the lack of any greater interest in the skill of the captain of another ship of the company than in that of the masters of all the other craft in whose vicinity he might happen to navigate is carrying out the thought expressed or implied in the words found at the beginning of the passage—namely, “special importance.” He is saying in effect : “How can you say that there is special importance in a case where the importance is exactly the same in the case of the captains of all the myriads of other ships ?” In reference to that passage, LORD ATKIN said, at p. 646 :

I adopt this reasoning, which appears to me clear and sensible. I seek to apply it to the case where the judge has found—and, as I think, rightly—that the two drivers were proceeding independently through the streets of Liverpool, though to the same destination. They might—indeed, would—in the course of their employment meet in the same garage, and, while there, be dependent on the skill with which each drove his vehicle, but, in regard to driving in the streets of Liverpool, the one was no more interested in the skill of the other than in that of the drivers of the myriads of other vehicles in whose vicinity he might happen to drive.

It seems to me that those words are completely applicable to the facts of this case. LORD WRIGHT expresses the same thought. He referred to *The Petrel* (2), and said, at p. 661 :

The deceased man was not exposed to the risk of the negligence of another employee of the respondents driving another of the company's coaches in any degree or in any sense other than he was exposed to the risk of any other driver's negligence on the road. The risk was the general risk of the highway, not the specific risk of the fellow-servant's negligence.

Those passages, as I have said, seem to me entirely to cover this case, but I must say a word as to the argument which was very ably presented to us by counsel for the respondents to the effect that a distinction ought to be drawn in such a case as the present between the case of vehicles

which travel along known and fixed routes and vehicles the juxtaposition of which is casual. He pointed out that the bus in this case was running along a specified route, that the tram was running along a specified route, and that the driver of the bus and the conductor of the bus must be presumed to have expected that, in the course of the bus's journey, it naturally, in the ordinary course of things, would on occasions—and perhaps on frequent occasions—come into such a position in relation to a tram that the driver and the conductor of the bus might be subjected to risk if the driver of the tram were negligent. I am unable, upon the facts of this case, to draw any such fine distinction. It seems to me that the governing consideration is that the risks which were being run were the risks of the high road, and none the less so because other employees of the company who were driving other buses or trams were proceeding according to some definite route, or some definite time-table, or both. It seems to me that, in a case such as this, to allow a distinction of that sort to be decisive would be introducing into the application of the rule a refinement for which there is no justification in common sense. When one is dealing with the question of the implication of terms, I cannot help thinking that there is room for a good deal of common sense in deciding what is the term which, upon any given facts, ought to be implied. In answering that question, it would, I think, be wrong to indulge in delicate refinement, and I myself find it unnecessary to do so.

That disposes of the main argument in the case. There were two subsidiary points which counsel for the appellant took. One was that the tram services and bus services belonged to two different departments of the defendant board, and that employment in them could not be considered as employment in the same work, or the same department of work, or anything of that kind. In view of the opinion which I have formed on the main point, I find it quite unnecessary to enter into that discussion. It must not be taken either that I consider the point is a good one or that I reject it as a bad one. I simply do not deal with it. To the other point the same observation applies. It was shortly that, under the London Passenger Transport Act, 1933, s. 73, the plaintiff here came into the service of the board by virtue of the Act of Parliament, and that, in view of that circumstance, and, in particular, in view of the provision in the section that the terms of service are not to be, without the servant's consent, worse than they were before the transfer, it would not be right to imply the necessary term into this man's contract which is required to bring the doctrine of common employment into operation. There again, that is a point into which I do not think it necessary to go. In the result, the judgment of the judge, which, as I have said, in the state of the law when his judgment was delivered, was, I think, a perfectly correct one, must nevertheless be reversed, and there must be judgment for the plaintiff for £3,715 with costs here and below.

FINLAY, L.J. : I agree, and have nothing to add.

DU PARCQ, L.J. : I also agree, for the reasons which have been given.

Judgment for the appellant for £3,715, with costs in both courts. Conditional leave to appeal to the House of Lords.

Solicitors : *Pattinson & Brewer* (for the appellant) ; *Solicitor to the London Passenger Transport Board* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

Considered. *Re MCGREAVY.* [1950]
1 All E.R. 30

Approved. *Re MCGREAVY.* [1950]
1 All E.R. 442.

Re NORTH BUCKS FURNITURE DEPOSITORIES, LTD.

B [CHANCERY DIVISION (Crossman, J.), **May 1, 1939.**]

Companies—Winding up—Petition—Creditor—Local authority to whom rates are due—No right to bring action for rates—Companies Act, 1929 (c. 23), s. 170.

C A company had not paid the rates due to a local authority. Upon the local authority presenting a petition for the winding up of the company, the question arose whether, as the local authority could not sue for the rates, it was a "creditor" within the meaning of the Companies Act, 1929, s. 170 :—

D HELD : although the local authority could not bring an action for the rates, but could only recover them by applying for the issue of a distress warrant, it was a creditor within the meaning of the Companies Act, 1929, s. 170.

[**EDITORIAL NOTE.** It having been recently decided in the Court of Appeal that a local authority has no power to bring an action for the recovery of rates, but is limited to the statutory procedure by distress, it was here contended that, for this reason, the local authority could not be a "creditor" of the company, nor could the company be indebted to the local authority, and that, therefore, the local authority was not in a position to petition for the winding up of the company. This contention, however, is rejected, upon the ground that those provisions of the Companies Act dealing with preferential debts show clearly that rates are a debt of the company.

F AS TO WHO MAY PETITION FOR WINDING UP, see HALSBURY, Hailsham Edn., Vol. 5, pp. 549-551, paras. 887, 888 ; and FOR CASES, see DIGEST, Vol. 10, pp. 829-836, Nos. 5405-5473.]

Case referred to :

(1) *Liverpool Corpn. v. Hope*, [1938] 1 K.B. 751 ; [1938] 1 All E.R. 492 ; Digest Supp.

G PETITION by the mayor, aldermen and councillors of the borough of Hampstead against the North Bucks Furniture Depositories, Ltd., claiming an order for the compulsory winding up of the company. The petition was based upon an allegation that the petitioners were creditors of the company for £64 5s. 7d. in respect of rates and costs.

H *G. R. Upjohn* for the petitioners.

CROSSMAN, J. : It appears from the petition in this case, which I must accept on the statutory affidavit as *prima facie* evidence, the company not appearing, that :

(a) the company is indebted to the petitioners in the sum of £64 5s. 7d. for general

rate and costs for the period from June 21, 1938, to Mar. 31, 1939, in respect of shop premises known as 289, Finchley Road, and for which the company is the rated occupier. (b) The said general rate has been duly demanded as provided by law. (c) The company has neglected or refused to pay the said general rate. (d) A summons in proper form was issued calling upon the company to show cause why they refused or neglected to pay the sum of £64 2s. 10d. being the amount due to the petitioners from the company in respect of the general rate for the period from June 21, 1938, to Mar. 31, 1939, but the company failed to show cause as aforesaid and on Feb. 2, 1939, a distress warrant was issued by the magistrates sitting at the Hampstead court of summary jurisdiction and on Feb. 14, 1939, your petitioners' bailiff attended at the premises occupied by the company, but was unable to find any goods and chattels of the company whereon to levy for the said sum of £64 5s. 7d. as the goods and chattels at the said premises belonged to other persons.

Then there is the allegation that, in the circumstances, it is just and equitable that the company should be wound up.

The question has been raised here—and I think it has been raised entirely in consequence of a recent decision in the Court of Appeal which it had been thought might have some effect upon petitions of rating authorities in respect of non-payment of rates—whether or not the rating authority, in this case the Hampstead Borough Council, is a creditor within the Companies Act, 1929, s. 170, and is therefore not entitled to present a petition. Sect. 170 provides as follows :

(1) An application to the court for the winding up of a company shall be by petition, presented subject to the provisions of this section either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately.

The only question which arises here—because, apart from this, I feel no doubt that it is a case in which the winding up order ought to be made—is whether or not the petitioners are creditors within the meaning of that section. The right to recover rates, as the admirable argument of counsel for the petitioners has put before me, arises under the Poor Relief Act, 1601, which provided that the overseers, as they were then, of the poor—and this borough council is now the rating authority in the position of the overseers—were to settle the rate and to demand it, and gave them power to apply to the justices to issue a distress warrant in case the rate was not paid. What was decided by the Court of Appeal in *Liverpool Corpn. v. Hope* (1), to which I have been referred, was that an action by a local authority to recover unpaid arrears of rates will not lie. The proper method of procedure in such a case is by application for a distress warrant, followed by a distress. Therefore, the county court judge having held that an action would lie in respect of unpaid arrears of rates, the Court of Appeal, reversing the decision of the county court judge, held that :

... a rate, not being a common law liability but the creature of statute, this method of procedure was wrong, and the only remedy available was that laid down by statute, namely distress.

The question is whether or not that affects the question I have before me—namely, whether or not the local authority in the present case is a

creditor within the meaning of sect. 170. It is quite clear that that decision would involve the fact that the local authority could not have sued this company in an action for the rates, but it does not seem to me really to bear upon the question I have to determine. All it determines is that it could not sue. The section does not say that nobody

A shall petition unless he has a right to sue, but a person, to have the right to petition, must be a creditor—not necessarily a creditor who can recover his debt by action, but a creditor. All I have to consider is whether, on the construction of this particular Act, the Hampstead Borough Council is a creditor. Counsel for the petitioners has called

B my attention to the section of the Act, which seems to me to be conclusive in favour of the view that a local authority, which has a right to recover rates from a company by distress, is a creditor of that company within the meaning of the Act. I think that that is shown by sect. 264 of the Act, which is the one which gives rates preference in the winding up

C of a company. Sect. 264 provides as follows :

(1) In a winding up there shall be paid in priority to all other debts (a) all parochial or other local rates due from the company at the relevant date, and having become due and payable within 12 months next before that date. . . .

D Then subsect. (4) refers to “the foregoing debts,” which must include “parochial or other local rates.” Then a little later in subsect. (4) it is provided as follows :

The foregoing debts shall . . . (b) in the case of a company registered in England, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures . . .

E This refers, apparently, to the persons who would be entitled to recover rates, among other things, as contrasted with general creditors, which seems to me to suggest that the Act is treating the persons entitled to recover rates as creditors. Then in subsect. (5) it provides as follows :

F Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts . . .

Thus it again describes these rates as “debts.” Then in subsect. (6) the rates are referred to as “the debts to which priority is given by this section.” It seems to me that, in view of sect. 264, it is impossible to

G suggest that the body which is entitled to recover these rates for which preference is given by sect. 264 is not a creditor of the company within the meaning of sect. 170. I should be disposed, in my own view, though it is not necessary for me to decide it here, to say that “creditor” under sect. 170 includes every person who has a right to prove in a winding

H up. It is not necessary to decide that here. Other questions might arise which are not in my mind at present, but I feel quite satisfied that I ought to hold that, under sect. 170, a local authority which is in a position to recover rates is a creditor within the meaning of that section, and is therefore entitled to present the petition. It follows that the Hampstead Borough Council is entitled to present the petition in this

case, and, that being the only question to be decided on the petition. I make the usual order for compulsory winding up of the company.

Order for compulsory winding up of company.

Solicitor : *P. H. Harrold*, Town Clerk, Hampstead (for the petitioners).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

R. v. HALLETT, *Ex parte* SMITH.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), **April 19, 1939.**]

Practice—Case stated—Order of quarter sessions “subject to a case to be stated” —Death of recorder before case settled and signed—Court’s jurisdiction to order present recorder to enter continuances and hear and determine merits of appeal—Criminal Justice Act, 1925 (c. 86), s. 20 (1).

S. applied to the local justices for a bastardy order against P., who was adjudged the putative father of S.’s child and was ordered to make certain payments. P. appealed to the general quarter sessions, whereupon the recorder, who sat by himself, allowed the appeal with costs, “subject to a case to be stated for the opinion of the King’s Bench Division of the High Court of Justice.” The case was thereupon drafted by S.’s counsel and submitted to P.’s solicitor, who refused to approve it and returned it. As the recorder had meantime died, and the case could not, therefore, be submitted to him for settling and signature, it was now sought to have a writ of *mandamus* directing the recorder for the time being to enter continuances and to proceed to hear and determine the merits of the appeal :—

HELD : as the recorder’s decision allowing the appeal “subject to a case to be stated” was a provisional, and not a final, determination, the court had jurisdiction to grant a *mandamus* to the newly appointed recorder to enter continuances and hear the appeal.

[EDITORIAL NOTE.] It is not often that the courts have to consider the necessary procedure where a judge or magistrate dies during the course of proceedings, but, as it must in the nature of things happen, from time to time, it is necessary that the steps to be taken should be known. The present case concerns the procedure where a recorder dies after a case has been ordered to be stated, and before it has been settled and signed.

AS TO PROCEDURE ON CASES STATED BY QUARTER SESSIONS, see HALSBURY, *Hailsham Edn.*, Vol. 21, p. 742, para. 1282 ; and FOR CASES, see DIGEST, Vol. 33, pp. 448-450, Nos. 1589-1611.]

Cases referred to :

- (1) *Liverpool Corpn. v. West Derby Union* (1904), as reported in 3 L.G.R. 647 ; 33 Digest 446, 1560.
- (2) *R. v. Suffolk JJ.* (1832), 1 Dowl. 163 ; 33 Digest 449, 1599.

RULE *nisi* for a writ of *mandamus* to be directed to the recorder of Newcastle-upon-Tyne commanding him to enter, or cause to be entered, continuances from session to session to the next general quarter sessions upon the appeal of one Fred Peacock against a bastardy order, dated May 12, 1938, whereby the justices sitting at the police court in Newcastle adjudged Fred Peacock the putative father of the child of one Jean Smith and ordered him to pay certain sums, and at such next general

quarter sessions to proceed to hear and determine the merits of the appeal.

W. A. Macfarlane showed cause.

Hon. Quintin Hogg in support of the rule.

- A LORD HEWART, L.C.J. : This matter arises in circumstances which are clearly set out in the affidavit of Mr. Wilson, solicitor for the prosecutrix, and the facts may shortly be summarised in this way. On May 12, 1938, Jean Smith applied to the justices in Newcastle for a bastardy order against Fred Peacock, who was adjudged the putative
- B father of her child and was ordered to make certain payments. Afterwards, on July 13, 1938, Peacock appealed to the general quarter sessions of the peace for the city and county of Newcastle, and thereupon the recorder, who was sitting by himself, allowed the appeal with costs, but agreed to state a case for the opinion of the High Court.
- C I am reading the words from the affidavit. Then, says this affidavit, in accordance with the usual practice, the case has been drafted by counsel for Jean Smith and submitted to the solicitor for Peacock for approval. He has, however, returned the case, and refused to approve it. The case cannot be submitted to the recorder for settling and
- D signature, as he has died. In those circumstances, it is sought that this court shall direct the newly appointed recorder to enter continuances in order that he may adopt and sign the case as his, following the directions given in *Liverpool Corp'n. v. West Derby Union* (1). On further reflection, it was evidently decided, and decided rightly, that
- E the conclusion of that prayer was wrong, that the correct application would be made in the form in which it is now made, and that there should be a writ of *mandamus* directing the recorder for the time being to enter, or cause to be entered, continuances from session to session to the next general quarter sessions, and at such general quarter sessions
- F of the peace to proceed to hear and determine the merits of the appeal. For a long time it was contended, and contended not without force, that, in the unfortunate events which have happened, there was no power in this court to issue a *mandamus* of that kind. I am bound to say that, if that were the case, it would, in my opinion, be a matter of
- G very great regret, because in that case by the mere accident of sudden death it might be that a party would be deprived of whatever benefits might be obtained from a decision of this court. It was argued, and strongly argued, that here there was a decision of quarter sessions in a matter arising out of an application for an order of bastardy that
- H that order must be final, and that the words to be found in this affidavit, or to be traced in the order made by the court of quarter sessions expressing an agreement on the part of the recorder to state a case for the opinion of the High Court, were really surplusage, and might be ignored. As I say, I think that it would be extremely unfortunate if, by reason of the regrettable death of the recorder, effective and due

hearing of an appeal which had been entered to quarter sessions should be defeated. However, I am glad to find, and the argument and authorities which have been made and adduced before us by Mr. Quintin Hogg leave no doubt in my mind, that we are under no such difficulty, and that the proper course here is the course which has been taken in at least two cases which are before us. I pass over, because they are merely confirmatory, the passages in ARCHBOLD'S QUARTER SESSIONS, 6th Edn., pp. 442, 444, to which our attention has been directed, but I think that the case referred to in the argument is very much in point. First of all there is *Liverpool Corpn. v. West Derby Union* (1). The last paragraph of the headnote in that case is as follows :

Where the recorder of a city, who had heard an appeal against the poor rate and provisionally dismissed the appeal subject to a case for the High Court, which he consented to state, died before stating the case, the court granted a *mandamus* to the newly appointed recorder to enter continuances and hear the appeal.

The report sets out the circumstances of that case, at p. 647 :

The appeal was originally heard by the late recorder, Mr. Hopwood, K.C., who provisionally dismissed the appeal and confirmed the rate, subject to a case for the High Court which he consented to state. Mr. Hopwood, K.C., however, died before stating the case, and Mr. Pickford, K.C., was appointed recorder of the city. Under these circumstances, inasmuch as Mr. Pickford, K.C., had no power to state a case on an appeal which had been heard by his predecessor in office, a Divisional Court (LORD ALVERSTONE, C.J., and RIDLEY, J.) on Nov. 25, 1904, on an *ex parte* application by the appellants, granted a rule *nisi* for a *mandamus* requiring Mr. Pickford, K.C., to enter continuances and hear the appeal. No cause was shown against the rule, and on Dec. 16, 1904, the rule was made absolute.

It is said that in that case, at any rate, what was done was done by consent. It may be so. It may be that a full report of that case would show that there was consent to the course which was then taken. Nevertheless, consent would not give jurisdiction to this court to make such an order if that jurisdiction did not already exist, and what appears on the face of this report is that a Divisional Court in 1904 granted a rule *nisi* for a *mandamus* requiring the new recorder to enter continuances and hear the appeal. Our attention has further been directed to the important case, extremely valuable in this connection at any rate, of *R. v. Suffolk JJ.* (2). The headnote of that case is as follows :

Where the quarter sessions have confirmed an order of removal, subject to a case for the opinion of the Court of King's Bench, and the justices cannot agree for several sessions on the terms of the case, this court will grant a *mandamus*, commanding them to enter continuances and hear the appeal ; for the order of sessions being only conditional, there is no decision unless the case is returned.

In that case, PARKE, J., said in the course of the argument, at p. 165 :

But here, no absolute order of removal was made. The sessions have restricted it, subject to the opinion of the Court of King's Bench.

Later he said, at p. 168 :

Since the question is of some importance, I will take an opportunity of speaking to the other judges of the King's Bench, as it may become a rule in similar cases for the future. If there has been no improper delay, I think a *mandamus* ought to go to the justices to enter continuances to hear the appeal, for they have not absolutely decided it. They have only decided it subject to a case for the opinion of this court.

In my opinion, those very words are directly applicable to what has happened in the present case. The recorder did indeed give judgment, and give judgment for one of the parties in the appeal before him. He agreed to state a case. He consented to state a case, and it was while that process of stating a case was not yet completed that he unfortunately died. In those circumstances, it seems to me that the provisional judgment which he had delivered has all the marks of a judgment such as is described here :

They have only decided it subject to a case for the opinion of this court.

After an interval had elapsed, and an opportunity for conference had occurred, PARKE, J., added, at pp. 168, 169 :

I have taken an opportunity of speaking to the other judges. They think with me, that the delay has not been so great as to preclude the appellants from having the rule for a *mandamus* to enter continuances and hear the appeal made absolute. The *mandamus* will therefore go, unless a case be settled in the meantime. We cannot command them to settle a case.

Finally, our attention has been invited, and properly invited, to a passage in SHORT AND MELLOR'S PRACTICE OF THE CROWN OFFICE, 2nd Edn., p. 433 :

Where the chairman dies before signing a case that he has granted, it is necessary to apply to the court for a *mandamus* to enter continuances and hear the appeal in order that the new chairman may adopt and sign the case as his. This was done in *Liverpool Corpn. v. West Derby Union* (1), and the rule was made absolute by consent on Dec. 16, 1904.

Here it is not suggested that, in the events which have happened in this case, the proper course would be that the new recorder should adopt and sign the case which had been partially assented to by the late recorder. The reason is obvious. The late recorder had not begun, as we are told, to bring his mind to bear upon the particular form in which the case was drafted. It may well be that in a case of this nature some hardship may possibly arise. It may well be that such an interval as that which has necessarily occurred in consequence of death may afford parties or witnesses on one side or the other opportunities of undesirable afterthought. There are other possibilities which occur to the imagination but which is it not necessary to state. It seems to me that all those minor matters are absolutely of no importance in comparison with the profoundly important matter that this court in a proper case should see that an appeal is effectively heard and determined. It seems to me to be a mere accidental detail to determine what particular point was reached in the process of hearing and determining. The point is that the process had not been completed. The hearing and the determination were still inchoate, and all that was done was subject to the opinion of this court, to be obtained by means of a case stated. That which was done seems to me to have been of no more force and effect than it would have been if the recorder had suddenly died at the end of the hearing of the evidence of one party, or at the end of the hearing of the evidence of the first witness. What is essential is that there

should be a proper hearing and determination, and it is not possible to hold that there was a proper hearing and determination when, *ex concessis*, all that was done was still incomplete, and was subject to the opinion, not yet obtained, of the King's Bench Division of the High Court. I am glad to find that the authorities seem to accord so clearly with that which one would have regarded as natural justice and highly A desirable from the public point of view. In those circumstances, I think that this rule must be made absolute.

HUMPHREYS, J. : I feel much more difficulty about this matter than does my Lord. I think that the question remains a difficult one B for decision. The difficulty arises from the use of the words to be found at the end of the order of the court of quarter sessions. The order which the court of quarter sessions made, which is the usual order which is made in any case where an appeal is allowed, is as follows :

It is ordered that the said appeal be allowed and the said order be quashed, and that the above-named respondent do pay the costs of the above-named appellant of and incidental to the said appeal to be taxed by consent of the parties out of sessions, the amount of such costs to be paid within 7 days of service of this order and of a certificate of taxation to the said appellant. . . . C

Then follow words which have given rise to this difficulty :

. . . subject to a case to be stated for the opinion of the King's Bench Division of the High Court of Justice. D

It was argued before us that such words at the end of such an order indicated that the court of quarter sessions had come to no final determination at all in the matter. For my own part, that argument did not impress me at all, and my view of the matter was very much confirmed E by a reference to the language of the Criminal Justice Act, 1925, s. 20, the section of the Act which deals with the vast majority of appeals which are held at quarter sessions, which provides as follows :

(1) After the determination by a court of quarter sessions of any appeal against a conviction by a court of summary jurisdiction or the sentence imposed on such a conviction, either party to the proceedings may, if dissatisfied with the determination of the court of quarter sessions as being erroneous in point of law, make an application in writing to the court of quarter sessions at any time within 7 days after the date of the determination of the appeal to have a case stated for the opinion of the High Court on the point of law. . . . F

The section then goes on to provide the procedure to be adopted in such G a case. Rules of Court have been made dealing with the procedure to be adopted on the statement of such a case. I still hold the opinion that in any such appeal the practice and the language of sect. 20 have the result that any such order made by a court of quarter sessions, even though it purport to be made subject to a case to be stated, is a H final determination of a court of quarter sessions upon the merits of the case, and would preclude this court from making any order in the nature of a *mandamus* directing another court of quarter sessions to hear that same case. However, at a somewhat late stage we were referred to an authority to which I am sure every judge of the King's

Bench Division, at this or any other time, would bow, and with the greatest pleasure would accept as undeniable law, since it is mainly the judgment of PARKE, J. As Mr. Hogg quite rightly pointed out to us, there may be, and I think is, a distinction between the ordinary appeals to quarter sessions and those which are neither appeals regulated
A by sect. 20 of the Act to which I have referred nor appeals which come within the ambit of any other statute, because quarter sessions has always had the right to state a case for the opinion of this court upon any matter of law arising in any proceedings on any appeal which came before them, quite apart from the language of any statute at all. It
B was in those circumstances that *R. v. Suffolk JJ.* (2), to which HEWART, L.C.J., has referred, arose. In that case, there was an appeal against an order of removal. The court of quarter sessions had heard and determined that question of removal, and had confirmed the order of removal, subject to a case for the opinion of the Court of King's Bench.
C Having undertaken to state a case for the Court of King's Bench, the members of the court of quarter sessions apparently found great difficulty in agreeing among themselves, and for a long time, at all events, the case was not stated. In those circumstances, application was made to the court for a *mandamus* to that court of quarter sessions to enter
D continuances and to hear the appeal. The decision of that case appears to me to be a decision which is binding upon this court to the effect that, in an appeal which does not come within the language of the statute which I have read, and in regard to which quarter sessions still, so far as I know, cannot be compelled to state a case, but in regard to which
E they may, if they choose, state a case, the addition of the words at the end of the order of the court "subject to a case to be stated for the opinion of the King's Bench Division" prevents the order from being one which is final and conclusive, and that, therefore, this court has power to direct another court of quarter sessions—that is to say, another
F court of the same quarter sessions—to hear and determine the matter. I do not myself read the decision of the judges in that case as being equivalent to what is proposed to be done in this case. In that case, PARKE, J., observed that the *mandamus* would have to go unless a case were settled in the meantime, and added, at p. 169 :

G We cannot command [quarter sessions] to settle a case.

My reading of that case is that all that was ordered there was either that quarter sessions, which had heard and determined the facts of the case, and decided everything which was material for decision in that case,
H should do what was their duty—namely, to state a case which they had undertaken to state and agreed to state—or that the whole matter should be regarded as a nullity and no hearing at all. From that it would follow that the whole matter would have to be heard in a different court of quarter sessions. The facts of the present case are very different from the facts of that case, but, as I have said, I think that

the decision, upon the face of it, is a decision binding upon this court in such a case as the present—that is, one which does not come within the language of any statute such as sect. 20 of the Act of 1925. It is sufficient authority to require this court to say that there is power—and, if there is power, I respectfully agree with what my Lord has said, that this is the class of case in which it would be desirable to exercise the power—of directing that another court of quarter sessions should hear the case *de novo*. A

I think it right to add that, in my opinion, at all events, it is essential that the old rule which has prevailed certainly as long as I can remember—namely, that the decision of a court of quarter sessions is final, and, so far as the facts are concerned, cannot be questioned by anyone, and that even this court has no power to order a court of quarter sessions to hear and determine a matter which they have once heard and determined according to law—should not be abrogated or weakened in any way. It is only because, in this particular case, I find that the words (perhaps unnecessary and unfortunate words to have put in the order at all, because they are quite unnecessary to the order, in my view) “subject to a case” are in this order that I agree that in this case the *mandamus* ought to go, and that the *mandamus* should take the form, if it is asked for, of a *mandamus* “to proceed to hear and determine the merits of the said appeal.” B C D

I only desire to add one thing about the earlier case of *Liverpool Corpn. v. West Derby Union* (1). If the mere decision in that case is looked at, it appears at first sight, at all events, to be an authority in favour of Mr. Hogg’s clients. However, I think that it is tolerably clear, looking at the case, that that was a rather exceptional matter, that the truth was that both parties were agreed upon the facts from the outset, and that the whole proceeding was taken with the object of getting a decision of this court upon a neat point of law. Thus, when the recorder, who had decided that case, and who, to use the expression which I find in the report of the case, had said that he would provisionally dismiss the appeal and confirm the rate, subject to a case for the High Court, died, it was by consent of the parties that his successor was directed to hear the case, and hearing the case really meant no more than that he should express his own view, no doubt, upon the point of law which was raised, and, whatever his own view was, should state a case for the opinion of this court. Subject to those observations, I agree that, upon the facts of this case, the judgment of this court ought to be that proposed by my Lord. E F G

SINGLETON, J.: I agree that the rule should be made absolute. The order of quarter sessions to which we were referred showed that the appeal to quarter sessions was allowed, subject to a case for the opinion of this court. There was obviously a question of law which the recorder thought worthy of consideration by this court. If a party H

is to be deprived of having that question considered by the High Court solely by reason of the fact that the recorder dies before the case is stated, it may well result in hardship, and, in some cases, in injustice. For a considerable time I held grave doubts as to whether we had power to make the order sought in this case, though I felt that there ought to be such power. It is clear that in *Liverpool Corpn. v. West Derby Union* (1) an order of the same kind was made. The report of that case shows that there was no opposition to the order. Indeed, as has been said already, it may well be thought that that which was done by this court was done by consent.

At a late stage in the argument, our attention was directed to *R. v. Suffolk J.J.* (2). I regard that case as directly in point. The decision was given after consultation by PARKE, J., with the judges of the King's Bench Division, and it is an authority which satisfies me that this court has authority to direct quarter sessions to proceed to hear and determine the merits of the appeal. The result of that will be that the present recorder will be able, if he thinks it right so to do, to state a case. In other words, he will be able to do that which the late recorder had agreed to do.

Rule made absolute.

Solicitors : *Gibson & Weldon*, agents for *Thomas Magnay*, Newcastle-upon-Tyne (showed cause); *Hewitt, Woollacott & Chown*, agents for *Swinburn G. Wilson & Son*, Newcastle-upon-Tyne (in support of the rule).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

DERRICK v. WILLIAMS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and du Parcq, L.J.J.), April 24, 25, 1939.]

Mistake—Mistake of law—Law subsequently changed by decision of House of Lords—Money paid into court taken out in satisfaction—Right to removal of stay of action.

Practice—Payment into court—Acceptance—Stay of proceedings—Procedure for withdrawing acceptance—R.S.C., Ord. 22, r. 2 (1), (2).

Practice—Pleading—Amendment—Leave—Necessity for amendment to be reduced into writing.

On July 26, 1935, the infant child of the respondent was killed by a motor lorry belonging to the appellant. The respondent, as the personal representative of the infant, thereupon brought an action claiming damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and in Oct., 1935, the appellant, as defendant in that action, paid into court £50 with a denial of liability, and that sum was taken out by the respondent. At that time, in reliance upon the decision of the Court of Appeal in *Rose v. Ford* (1), it was thought that damages could not be recovered in respect of loss of expectation of life, but that decision was in 1937 reversed in the House of Lords. The respondent on Sept. 27, 1938, brought the present action, based upon the same facts as the previous action, and claimed damages for loss of expectation of life.

The appellant took the preliminary point that the acceptance of the sum paid into court in the previous action was a bar to the present proceedings. The court decided this point in favour of the appellant, but gave the respondent leave to amend his statement of claim, without, however, defining the terms of the amendment. The respondent, in his amended statement of claim, claimed to be entitled to withdraw his acceptance of the sum of £50, or, alternatively, to have the agreement by which he accepted the sum set aside, on the ground that it was made under a mistake of fact or a mistake of law. The appellant appealed against the order so far as it allowed an amendment of the statement of claim :—

HELD : (i) as the effect of the acceptance of the money paid into court was to stay the proceedings, the respondent's proper course was to apply in the action to have the stay removed and to have liberty to withdraw his consent. This was not, however, a case in which such an application would have been granted

(ii) a litigant whose claim has been satisfied by money paid into court cannot afterwards contend that that money was accepted under a mistake in law, on the ground that the law was not as then laid down by the Court of Appeal, but as subsequently enunciated by the House of Lords.

(iii) where leave to amend is asked for, the actual amendment should be formulated before leave is given.

[EDITORIAL NOTE.] The court has to apply the law as it is at the time when the decision is given, and the fact that the law is subsequently altered by a decision of a higher court or by the legislature gives no right to have an action retried. It would, of course, be a different matter if the decision of the higher court were given while an appeal in the case was pending. This case also shows the necessity for an amendment of pleadings to be reduced to exact terms before leave is given for such amendment.

AS TO EFFECT OF CHANGE OF LAW BY DECISION OF HIGHER TRIBUNAL, see HALSBURY, Hailsham Edn., Vol. 23, p. 167, para. 244; and **FOR CASES**, see DIGEST, Vol. 35, p. 160, Nos. 561, 562. See also **YEARLY PRACTICE OF THE SUPREME COURT**, 1939, pp. 368, 369.]

Cases referred to :

- (1) *Rose v. Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174.
- (2) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 36 Digest 122, 810; 53 L.J.Q.B. 476; 51 L.T. 529.
- (3) *Coote v. Ford*, [1899] 2 Ch. 93; 40 Digest 425, 472; 68 L.J.Ch. 508; 80 L.T. 697.
- (4) *Newington v. Levy* (1870), L.R. 6 C.P. 180; 21 Digest 177, 291; 40 L.J.C.P. 29; 23 L.T. 595.
- (5) *Re Roberts, Roberts v. Roberts*, [1905] 1 Ch. 704; 35 Digest 97, 55; 74 L.J.Ch. 483; 93 L.T. 253.

APPEAL by the defendant against that part of an order of ATKINSON, J., dated Mar. 30, 1939, giving the plaintiff liberty to amend the statement of claim. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

Serjeant Sullivan, K.C., and *C. N. Shawcross* for the appellant.

Ralph H. Etherton for the respondent.

Sullivan, K.C. : Loss of expectation of life is not a separate cause of action, but a claim for damages in an action. A judgment in general

- demurrer put an end to the proceedings, but in special demurrer there was usually liberty to amend and to plead over. The first amendment which is proposed ought not to be allowed because it is open to a radical objection in law. If it is allowed, it must be only on the condition of repayment into court of the £50 and the costs. This amendment is
- A utterly unsound, and, if a remedy can be conceived, it is to re-lodge the money paid out in the previous action and to set that action going again. If the amendment is allowed, the former action would be revived, and there would then be two actions in respect of the same cause of action. In *Coote v. Ford* (3), the plaintiff took money out of court and claimed
- B he had terminated the action, but it was held that he had not thereby terminated the defendant's counterclaim. In *Newington v. Levy* (4), which was an action on a promissory note, the defendant pleaded that a composition deed which had been entered into was a bar to the action on the note. A payment into court as a matter of satisfaction becomes
- C a defence to a matter arising subsequently: *Newington v. Levy* (4). The acceptance of money paid out of court is equivalent to an estoppel of record. There is no case in which a plaintiff who has taken money out of court has applied to set the action going again. The court should not
- D be asked to conduct the investigation of a case which is 3 years old when it is extremely unlikely that the parties can be in the position in which they were as regards the conduct of the action. The mere repayment of money would not be putting them in the same position. The defendant has not in any way misled the plaintiff, and it is not so alleged. The plaintiff has performed a solemn act in terminating his suit on terms
- E which he thought to be right.

- Etherton*: The original action was one to recover damages for personal injuries, and included a claim for £26 for special damage. In *Brunsdon v. Humphrey* (2), the plaintiff recovered in respect of damage to his cab and afterwards in respect of personal injuries. Leave to amend should be
- F given so that it may be argued that the stay or compromise should be set aside by reason of a mistake of fact or a mistake of law. The mistake of law which was made was that it was thought that no claim could be made for loss of expectation of life, but by reason of the decision of the House of Lords in *Rose v. Ford* (1) such a claim can be made. That is a ground
- G for asking that the compromise should be set aside. The jurisdiction of the court under R.S.C., Ord. 43, should be exercised where a mistake of this kind has arisen. If it was not a mistake of law, it was a mistake of fact, in that the money was taken out of court in the belief that it was taken out in respect of one head of damage only. *Re Roberts, Roberts*
- H *v. Roberts* (5) was a case in which it was held that a compromise can be set aside if one of the parties has entered into it on what afterwards proves to have been an erroneous view of the facts or the law.

SIR WILFRID GREENE, M.R.: This is an appeal by the defendant against an order of ATKINSON, J., deciding in favour of the defendant a

point of law raised in the defence, with the result, as the order states, that the plaintiff is thereby "precluded from maintaining this action in its present form." ATKINSON, J., did not, however, take the step of dismissing the action as a consequence of that decision, but gave the plaintiff liberty to amend his statement of claim. We are told that the general nature of the amendment which the plaintiff wished to make was indicated to the judge, but there was not before him any written amendment which could have been discussed. I would like to say that, where leave to amend is asked for, whether it be asked for in the ordinary way by summons, or, in circumstances such as these, after the conclusion of some other matter before the judge, it is very inconvenient that leave to amend should be given before the actual amendment is formulated, because the result may very well be, as it has been in this case, that, when the amendment is formulated, it is found to be objectionable. In cases where leave to amend is asked for, it is, in my view—and I speak with some considerable experience in this matter—of very great importance, except possibly in fairly simple cases, that the precise terms of the amendment should be seen, not merely for the information of the tribunal which is dealing with the application, but also so that the other side may see exactly what it is that is being asked, and direct their arguments to some concrete proposition. In the present case, the amendment was finally embodied in an amended statement of claim, and it is said by the defendant, the appellant in this court, that that amendment ought never to have been allowed. We must treat the matter as though that amendment, as it was subsequently formulated, was the amendment which the judge was asked to allow, and on that basis we have to consider whether, in these circumstances, he would have been right in allowing an amendment in this form if the precise amendment had been before him. The appellant, as I say, says that the amendment ought never to have been allowed. Alternatively, he says that, if it had been allowed, it should only have been allowed on terms. He further points to a provision in the order which prohibits any other issues arising in the action from being tried before the trial. The effect of that would have been to prevent the defendant from challenging, by interlocutory proceedings, any amended pleading which might be put in. In the view which the court takes as to the amendment itself, there is no necessity to go into those subsidiary or alternative arguments. However, I may be permitted to say that the danger of allowing amendments without seeing what they are is accentuated if the leave to amend is coupled with an order such as this, which would prevent the defendant from attacking the amendment when he saw it. No reason has been suggested to us why that particular provision should have been inserted, but I do not propose to say anything more about it, because, in my opinion, the appeal succeeds upon the main ground.

The facts of the case are rather unusual. On July 26, 1935, a little boy aged 19 months was killed by a motor lorry belonging to the defendant.

His father, the present respondent, brought an action, as the personal representative of the deceased child, for damages. The damage claimed was in respect of the wrong done to the infant by the alleged negligence of the defendant's servant in driving the lorry, and the action was maintainable by the legal personal representative by reason of the Law Reform (Miscellaneous Provisions) Act, 1934. On the face of that statement of claim, there can be no doubt that it was a claim in respect of the negligence alleged, and a claim to recover all damages which the law recognised as recoverable in respect of that wrong. After delivering, or at the time of delivering, a defence—I am not sure which, and it does not matter—the defendant paid into court the sum of £50, and by his notice of payment in he said that that sum was sufficient to satisfy the plaintiff's claim therein, if any, and that the payment was a payment with denial of liability. Six days after the payment in, the plaintiff, by his solicitors, served notice of acceptance of that sum in the usual form in satisfaction of the claim in respect of which it was paid in—that is to say, the whole claim in the action. The money was duly paid out to the plaintiff. His costs were taxed, and those costs were paid. That took place in Oct., 1935. At that period, *Rose v. Ford* (1) had been decided in this court, and, upon the assumption that that decision correctly stated the law, the plaintiff formed the conclusion that, in respect of the infant's expectation of life as a head of damage in his claim, he would not be entitled to recover anything, in the circumstances of this case. In that belief, he took out the £50, which he no doubt thought was an ample sum to cover the special damage of £26 12s. 6d. which he claimed, and damages for pain and suffering suffered by the infant in the short time before its death, because it died the same day. That had been thought to be an end of the matter, but in June, 1937, the decision of this court in *Rose v. Ford* (1) was reversed by the House of Lords, and, encouraged by that circumstance, the plaintiff was minded to see if he could not take advantage of it. Accordingly, some 15 months later, on Sept. 27, 1938, he issued the writ in the present action. In this action, he again sues as administrator of the deceased infant. He alleges that the negligence of the defendant's servant caused the death of the infant, and so forth. The facts are the same as those alleged in the previous action. Para. 4 of the statement of claim is as follows :

By reason of the premises the deceased who was 19 months old at the time lost the expectation of many years of life and his estate has suffered damage.

Accordingly, the father claimed damages. There can be no question whatever that the claim for damages set up there is included in the claim for damages made in the previous action. Nevertheless, we are told, and it seems the probable explanation of this pleading, that it was framed upon the hypothesis that a claim for damages for loss of expectation of life is based upon a wrong different and distinct from the wrong upon which a claim for damages in respect of pain and suffering is based. I shall say a word about that matter in another connection presently.

The defendant, in the material paragraph of his defence, pleaded the acceptance of the money paid into court under the previous action, and alleged that, in consequence of that acceptance, the plaintiff was precluded from maintaining this or any further action arising out of or in respect of the same cause of action. The point of law raised by that paragraph was ordered by the district registrar to be set down for hearing as a point of law, and that is the point of law which ATKINSON, J., decided in favour of the defendant. The result of that decision was, of course—and this is not disputed—to dispose of the whole action. No appeal from that decision has been brought by the plaintiff, and he is accordingly bound by it. At one stage he indicated an intention to appeal, but he did not do so. Therefore, no appeal upon that matter is before us. Counsel for the respondent suggested that the court might grant an indulgence here, and might allow him to take the point in the absence of notice of appeal. Any such indulgence could only be granted in special circumstances, and the point which he wished to argue, which was decided against him by the judge—namely, that a claim for damages in respect of loss of expectation of life is based on a different cause of action from that relating to pain and suffering—did not, upon the face of it, commend itself to this court sufficiently to afford any justification for allowing counsel for the respondent to take the point. He had not appealed against the order. He had availed himself of the liberty which the order gave him to put in an amended statement of claim, and by that action he must stand or fall.

The amendment which, pursuant to the leave given by the judge, the plaintiff introduced into his statement of claim is one which I need not read at length. It is sufficient to say that by it he claims to be entitled to withdraw his acceptance of the sum paid in, and, alternatively, he claims to have the agreement, if it be an agreement, by which he accepted that sum in satisfaction of his claim set aside on the ground that it was made under a mistake of fact, or a mistake of law. It is to be noticed that the statement of claim does not claim that in the prayer at all. What the amendment is doing is, so to speak, setting up by anticipation an answer to the defence already put in by the defendant in the previous action, and asserting that, by reason of the facts stated, that defence should not be available to the defendant. The amendment is attacked root and branch on two grounds. First of all it is said that, if it be competent, in proper circumstances, for a plaintiff, who has accepted money paid into court in satisfaction of his claim, to resile from that acceptance, his only course is to make a proper application in the action in which the money was paid in. The effect of the acceptance of money so paid in is as is laid down in R.S.C., Ord. 22, r. 2 (2) :

... proceedings in the action or in respect of the specified cause or causes of action (as the case may be) shall be stayed.

It is said that his only course would be to apply in the action to have the stay removed, and to have liberty to withdraw his consent and so put the original action back in the same position as it would have been if the

- money had never been taken out of court. Whatever may be the circumstances in which such a step would be permissible—and there must be circumstances, for instance, fraud, in which the court would grant leave—obviously the court would not accede to an application of that nature unless good ground were shown for it. In my opinion, however, the con-
- A tention of counsel for the appellant on that matter, which I may describe as a matter of procedure, is correct. It seems to me that it is a misconception to think that the procedural step of accepting money paid into court in satisfaction of a claim is one the consequence of which can be got rid of by some separate proceeding. It is not a case of setting
- B aside a judgment obtained by fraud, in which an action is necessary for the purpose. The original action is merely stayed. It is not disposed of by judgment, and it seems to me, as I have said, that the argument of counsel for the appellant upon that point rests upon solid ground. The substantial point, however, apart from the question of procedure, is one upon which,
- C in my opinion, this amendment also fails. In a nutshell, the amendment is as follows : “ I am entitled to withdraw my consent to having my claim satisfied by the money paid into court, because, at the time when I so consented, I was under a misapprehension as to the law.” It was suggested by counsel for the respondent that there was some
- D mistake of fact. Even if that would have helped him—and I express no opinion at all upon that—I can see no suggestion of a mistake of fact in this case. It was a mistake of law, and consisted of the fact that the plaintiff was under the belief that the law as laid down by this court in *Rose v. Ford* (1) was correctly laid down. In that he was wrong, and he is
- E asking the court to say that, having acted upon the basis of a mistaken view of the law, now that the law has been enunciated by the highest tribunal, he is entitled to make another attempt. That is a thing which, it seems to me, cannot be permitted on principle. It appears to me to be completely indefensible. No shadow of authority was cited to us which
- F would justify the proposition that, where, pursuant to the rules of court, a claim has been satisfied by money paid into court by the defendant, the plaintiff can afterwards come and say : “ I was wrongly advised as to the law when I did this, because the law was not as then laid down by the Court of Appeal, but as subsequently enunciated by the House of
- G Lords.” It would be an intolerable hardship on successful litigants if, in circumstances such as these, their opponents were entitled to harass them with further litigation because their view of the law had turned out to be wrong, and, unless I were constrained by binding authority, I should be quite unable, on principle, to accept any such proposition. Therefore,
- H it seems to me that, not only on the point as to the correct procedure to be followed, but also on the point of substance as to the right to get rid of the effect of the acceptance, the appeal succeeds. The result is that the order of the judge on the point of law stands, but the rest of his order, by which he gave liberty to amend the statement of claim and ordered that any other issues be tried at the trial and not before, must be dis-

charged. As the effect of the decision of this court is that the order on the point of law now stands by itself, and disposes of all the issues in the action, the action must stand dismissed with costs.

FINLAY, L.J. : I entirely agree with SIR WILFRID GREENE, M.R., and I only desire to add a word with regard to *Brunsdon v. Humphrey* (2). A That is a case which has always been regarded as a case of much authority, although in that case this court was reversing the decision of the Queen's Bench Division, and was not unanimous. When that case is looked at, however, I think that it affords no support at all for the argument in support of which counsel for the respondent desired to cite B it. That was a case in which there had been a collision between a cab and a van. The vanman had been guilty of negligence. The cab was damaged, and the cabman was injured. An action having been brought in respect of the damage to the cab, it was then desired to bring a further action in respect of the injuries to the cabman, and the question, which C the court obviously found to be one of some difficulty, arose as to whether that second action could be brought. The gist of the decision at which the majority of the Court of Appeal arrived is clearly seen by looking at a single passage in the judgment of SIR WILLIAM BRETT, M.R., at p. 145 :

The collision with the defendant's van did not give rise to only one cause of action : the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods : therefore the plaintiff is at liberty to maintain the present action. D

When the basis of the decision of the majority of this court is understood, it seems to me impossible to derive from that case the slightest support E for the startling proposition that, if in an action some head of damage which might have been claimed is not claimed, and there is no recovery in respect thereof, then the matter can be re-opened. For a separate action or a re-opening of the former action—it matters not which may be pursued in respect of that head of damage—the essential distinction, F which is a perfectly obvious one, is between a distinct cause of action and some head of damage. I only desired to add those few words with regard to that case in order to distinguish it from this case, and I entirely agree with the way in which the matter has been dealt with by SIR WILFRID GREENE, M.R. G

DU PARCQ, L.J. : I agree that our judgment should be in the form proposed by SIR WILFRID GREENE, M.R., for the reasons which he gave. I also agree with what has been said by FINLAY, L.J., as to the basis of the decision in *Brunsdon v. Humphrey* (2) and its bearing on this case, and I do not think that I can usefully add anything further. H

Action dismissed, with costs.

Solicitors : P. F. Walker, agent for *Weightman, Pedder & Co.*, Liverpool (for the appellant) ; *Savage Cooper & Wright*, agents for *G. H. Stock & Co.*, Liverpool (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

In the Estate of THOMAS, PUBLIC TRUSTEE v. DAVIES
(CAPLE INTERVENING).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.),
February 21, 22, 23, April 5, 1939.]

A *Executors—Probate—Of what probate may be granted—Document of no dispositive effect—Codicil the provisions of which as construed by court take effect only on testator surviving his wife—Duty of Probate Court to construe document—Surrounding circumstances.*

B In 1907, J. T. and his wife M. T. made mutual wills (drafted by J. T.) each appointing the other universal legatee and sole executor. After these wills had been duly executed, J. T. placed them in an envelope in his office safe, and there they remained until his death in 1933, when his will was found and proved in favour of his wife, M. T. M. T. had, 8 days before the proving of this will, made a new will appointing the Public Trustee, the plaintiff in this action, as executor. She died in 1937, and, while search was being made for her will, there was found a holograph document dated Apr. 16, 1931, duly signed and executed by J. T., and described in its initial words as a codicil to his last will and testament. Its first provision was to confirm the will of 1907, and it then went on to state as follows: "If I survive my wife M. T. and inherit under her will any of the estate . . . including stocks and shares or other property furniture etc. belonging to such estate I devise and bequeath such property . . . to my sister-in-law C. T. . . . and I appoint the said C. T. sole executrix of this my will." It then proceeded as follows: "Out of my own and separate estate I bequeath the following legacies." Then followed a residuary gift in favour of nephews and nieces, and lastly an appointment of 2 of his nephews as executors "of this my will":—

E HELD: (i) the meaning to be attributed to the words used both in the will and in the codicil could be discovered only by taking account of extraneous surrounding circumstances, and, reviewing the document in the light of the material facts and extrinsic evidence, it was clear that the testator intended the whole of the codicil to be dependent upon his survivorship of his wife.

(ii) it was within the scope and duty of a Court of Probate to make such limited construction of documents before it as was necessary to determine (a) what documents ought to be admitted to probate and (b) to whom administration should be granted.

F (iii) in the circumstances, the document of 1931 was of no dispositive effect, and should not be admitted to probate.

[EDITORIAL NOTE. Every document purporting to be testamentary and executed in accordance with the Wills Act, 1837, is entitled to be admitted to probate, provided that it disposes of property. The present case turns upon the proviso just referred to. That is to say, it is a question whether the document sought to be proved did in fact dispose of property. In order to determine this question, it was necessary to consider in some detail what was the proper construction to be placed upon the provisions of the document. The Probate Court has undertaken the duty of construing the provisions of the document, and, since they have found them to be of no dispositive effect, the document, although duly executed, was not admitted to probate.

H AS TO WHAT MAY BE ADMITTED TO PROBATE, see HALSBURY, Hailsham Edn., Vol. 14, pp. 192-194, para. 316; and FOR CASES, see DIGEST, Vol. 23, pp. 93-95, Nos. 863-878.]

Cases referred to:

- (1) *Re Baker, Baker v. Baker*, [1929] 1 Ch. 668; Digest Supp.; 98 L.J.Ch. 174; 141 L.T. 29.

- (2) *Thellusson v. Rendlesham* (Lord), *Thellusson v. Thellusson*, *Hare v. Roberts* (1859), 7 H.L.Cas. 429; 44 Digest 559, 3753; 28 L.J.Ch. 948; *sub nom. Thellusson v. Roberts*, *Hare v. Roberts*, *Rendlesham v. Roberts*, 33 L.T.O.S. 379.

PROBATE ACTION to determine what testamentary documents should be admitted to probate. The facts and arguments are fully set out in the judgment. A

Clifford Mortimer and *R. L. Bayne-Powell* for the plaintiff.

R. Gwyn Rees for the second, third, fourth and fifth defendants.

George Maddocks for the sixth defendant.

Hon. Victor Russell for the intervener. B

LANGTON, J.: The testator concerning whose testamentary dispositions the dispute in this case arises was John Richard Thomas, an auctioneer, who lived in the neighbourhood of Pontypridd, Glamorgan. The facts out of which the dispute arises are a little complicated. John Richard Thomas died on Feb. 1, 1933. His wife, Mrs. (Margaret) Thomas, died on Mar. 14, 1937. Both of them were predeceased by Miss Catherine Thomas, the wife's sister, who was living with them at the time of her death and who had passed a very considerable portion of her life as an inmate of their house. Both Mrs. (Margaret) Thomas and her sister Miss Catherine Thomas were women of property. On Mar. 2, 1907, when they were comparatively young people, Mr. John Richard Thomas and his wife, Mrs. (Margaret) Thomas, had made mutual wills by which each left everything he or she possessed to the other, each constituting the other sole executor as well as universal legatee. Unfortunately, as matters turned out, Mr. Thomas, in addition to many excellent qualities and shrewd business acumen, possessed what proves in many cases to be the harmless vanity of believing himself to be skilled in the drafting of testamentary documents. Both the mutual wills were accordingly drafted, and, indeed, written throughout, by Mr. Thomas himself. These two wills were simple in conception, and proved to be within his powers as a draftsman, and no question arises concerning the complete validity of each of these instruments in themselves. When they had been duly drawn up and executed, Mr. Thomas placed them together in an envelope in his own office safe, and they appear to have been preserved in this receptacle until the date of his death. When he died, rather suddenly, on Feb. 1, 1933, his wife turned to the family solicitor, Mr. George David, of George David & Co., Cardiff, who found the wills in the envelope in which Mr. Thomas had placed them, and, after an unproductive search for any other testamentary documents, proved Mr. Thomas's will of Mar. 2, 1907, in favour of his wife. Eight days prior to the proving of this will, Mrs. (Margaret) Thomas on May 4, 1933, made a new will appointing the Public Trustee, the plaintiff in the present action, as her executor, and, after bequests to the present defendants, she constituted Captain Caple, the intervener in this action, as her residuary legatee. C D E F G H

This will of May 4, 1933, was supplemented by a codicil of Aug. 25, 1933, but no point arises in the present litigation which concerns either of these documents.

A After the death of Mrs. (Margaret) Thomas on Mar. 14, 1937, Mr. George David and the defendant Frank Davies went to the house of the deceased on Apr. 7, 1937, to make an inventory of her possessions, and at the same time to make a further search for testamentary documents of Mrs. (Margaret) Thomas. The last thing which either of them expected to find was a further testamentary disposition emanating from John Richard Thomas, whose will had been duly proved by Mr. David 4 years
B earlier. The searchers found no further testamentary documents of Mrs. (Margaret) Thomas, but in a small room on the ground floor they found, in a linen press underneath a cupboard, a small and very ordinary-looking box file containing for the most part documents of no significance, but also containing a closely-written holograph document, composed of
C 2 pages, apparently duly signed and executed by John Richard Thomas, describing itself in its initial words as a codicil to his last will and testament. This document bears date Apr. 16, 1931, and it is round and concerning the various provisions contained therein that the dispute in the present action centres. This remarkable document was not only written
D throughout by John Richard Thomas, but was also, I think, in view of his minor vanity as a draftsman, to which I have alluded above, probably conceived throughout by Mr. Thomas himself. It is a far more ambitious effort in the domain of drafting than were the comparatively simple wills which Mr. Thomas had produced in 1907. Its first provision is to
E confirm his will of Mar. 2, 1907. It goes on to state as follows :

If I survive my wife Margaret Thomas and inherit under her will any of the estate forming part of the Llechwan Wern and Gellergron estates including any stocks and shares or other property furniture etc. belonging to such estate I devise and bequeath such property stocks and shares or other property to my sister-in-law Catherine Thomas of Llechwan near Pontypridd aforesaid absolutely and I appoint the said Catherine Thomas sole executrix of this my will.

F It will be observed from these last words " this my will " that Mr. Thomas was already stumbling a little in the difficult art of drafting, since he had commenced the document with the words : " This is a codicil to the last will and testament of me John Richard Thomas." The document next
G proceeds as follows :

Out of my own and separate estate I bequeath the following legacies. . . .

Then, after some substantial bequests, the document commences a new paragraph, which runs as follows :

H I bequeath to my nephew Gwyn Thomas the only surviving son of my brother David my three auction marts with the land on which same are built respectively at Llantwit Major, Cowbridge and Ely-Cardiff together with the goodwill of my business of auctioneer and valuer and the office furniture books and papers and book debts at my Cardiff office absolutely.

Then follows a final bequest in the following terms :

All other freehold and leasehold property investments and cash wherever situated to my three nephews Gwyn William Ronald and my niece Muriel the 3 latter being

the sons and daughter of my deceased brother Tom in equal shares absolutely after the payment of all my just debts and testamentary expenses.

There follows the appointment of 2 of his nephews as executors "of this my will," and, after a forfeiture clause aimed at "any person" who "shall dispute the validity of this my will or any codicil hereto," which concludes with the words "named in this my will," he terminates A the operative part of the document with the following words :

In witness whereof I the said John Richard Thomas have to this codicil set my hand this Apr. 16, 1931, contained in 2 sheets of paper.

This document was duly signed by the testator, and, after a full attestation clause, the signatures of 2 witnesses were appended. Both these B 2 witnesses were called before me, and, after hearing their evidence, I had no doubt as to the due and proper execution of this codicil. The witness Jones is now married, and was employed for 12 years by John Richard Thomas. The witness David Richards had spent 25 years of his life in the service of Mr. Thomas, and both of them gave convincing evidence C as to Mr. Thomas's handwriting and signature, and fair and reasonable evidence as to their recollection of the circumstances of signature..

As regards the execution of the original will of Mar. 2, 1907, some doubt arose by reason of the evidence of one of the attesting witnesses, Fred C. White. After a short period in the office of Mr. Thomas as D office boy, Mr. White in 1907 became a plumber. He appears to have left Mr. Thomas's employment about Apr., 1907, and, although his recollection was never stimulated concerning the signing of this will until about 12 months ago, he professes to remember with equal clarity both the signing of the document and the fact that the other witness, Frank E Davies, was not present when he, Fred White, affixed his attesting signature. Counsel for the plaintiffs, in re-examination, did not succeed in shifting Mr. White from his original position, but, in answer to my own questions Mr. White receded so far as to say that he could be "almost F positive that Frank Davies was not in the room when I signed the will." Mr. Rees in argument quite fairly pressed upon me that, despite the lapse of 30 years, the plastic and impressionable state of Mr. White's youthful mind might well account for this astounding retention of what must have been to him, an office boy of 16 years of age, an insignificant and quite un-G interesting detail. There was no suggestion by anyone, and there is not the slightest reason to believe, that Mr. White has given me anything but a completely honest view concerning his own recollection. Moreover, his view, in a sense, stands alone, since it is neither confirmed nor contra-H dicted by Frank Davies, the other witness to the will, who told me, with a candour which I both admired and accepted, that at that distance of time he had no recollection at all concerning the circumstances of signature. On the other hand, I have to put against Mr. White's professed recollection what are to me the strong, and, indeed, the almost overwhelming, probabilities of the occurrence. The will in question was not only a home-made document. It was written out *in extenso* by Mr. Thomas

himself. The attestation clause, which was almost certainly copied from a form or book of precedents, states in the usual terms that the will has been signed :

. . . in the presence of us both present at the same time who in his presence at his request and in the presence of each other have hereunder subscribed our names.

- A Nor does this attestation clause follow directly upon the last line of the will. A space of 2 lines was left by Mr. Thomas between the will and the clause, and even at this distance of time there is discernible a difference between the writing of Mr. Thomas's signature and the writing employed both in the body of the document and in the attestation clause itself. It
- B appears to me almost overwhelmingly probable that the document was drawn up in this way in order to leave space for the signature of John Richard Thomas when the witnesses were invited to subscribe their names. In addition, in order to accept the evidence of Fred White, I have not only to overcome the presumption which always exists in favour of a document
- C which is apparently well executed, but have also to take the much longer step of imagining that Mr. Thomas, who had taken the trouble to acquaint himself with the exact terms of an attestation clause, and had but lately committed these terms to paper himself, should have gone out of his way to execute this will in a manner contrary to such terms. Finally, I
- D have the evidence of Mrs. Addie and Mr. David Richards concerning the execution of the codicil of 1931 to assist me powerfully in coming to the conclusion that Mr. Thomas, who was admittedly a man of considerable shrewdness and capacity, had at least mastered the simple requirements for the due execution of a will. Without, therefore, casting the slightest
- E reflection on the *bona fides* of Mr. Fred White, I do not accept his recollection, and I find unhesitatingly that the will of Mar. 2, 1907, was duly and properly executed.

- Since, then, both the testator's will of 1907 and the document which I shall hereinafter refer to as the codicil of 1931 were duly executed,
- F questions arise as to their testamentary value for purposes of admission to probate, and also there arises out of these questions the problem of the person to whom the administration should be granted. The main question is whether the words which are at the commencement of the second sentence in the codicil—"If I survive my wife"—govern only
- G the succeeding paragraph, thus making a conditional disposal of the property referred to in that paragraph, and having no reference to the further dispositions in the codicil, or whether, as the plaintiff contends, they must be taken to apply to all the succeeding dispositions as well as to the actual paragraph in which they occur. If the plaintiff's con-
- H tentions were well founded, the whole of the dispositions contained in the codicil would thus be conditional upon an event which did not occur—namely, the testator's survival of his wife—and the document would be of no practical importance. If, on the other hand, the conditional words ought to be held as referring only to the paragraph in which they occur, all the succeeding dispositions are unconditional, and this document must

be read together with the testator's will of 1907 in order to discover the full testamentary intentions of John Richard Thomas.

It will be convenient at the outset to dispose of what is a preliminary point in the argument of counsel for some of the defendants, which I understood was adopted by counsel for another defendant. Taking their stand upon the agreed and accepted grounds that this court is a court of probate, and not a court of construction, they contend that it is no part of my duty to attempt a determination of this exceedingly knotty problem. My function, according to them, is limited to deciding what documents may fairly be admitted to probate, and thereafter every question concerning their meaning falls to be determined by a Chancery court. I cannot deny that I found this suggestion peculiarly seductive. I pretend to no skill in the difficult art of construction, and the last people with whom I would wish to compete in this subtle art would be my brethren of the Chancery Division. There seems to be some warrant for the contention adduced in *Re Baker, Baker v. Baker* (1). In that case, 5 testamentary documents were all admitted to probate by this Division, and it fell to EVE, J., to determine which of these revoked or revived any of the others. I do not conceive it any part of my duty to attempt to lay down a rule or rules of practice in this matter, but I cannot shut my eyes to the fact that there are a great many cases in the books in which this court has essayed the task, and apparently accepted the duty, of making such limited construction of the documents before it as was necessary to determine (i) what documents ought to be admitted to probate, and (ii) to whom administration should be granted. The latter point is especially in evidence here, and I cannot believe that I ought to abandon the task of trying to nominate the proper administrator and send all the parties in this case upon an expensive journey to another division of the High Court merely because the performance of that task happens to involve a question of construction. For this reason, I do not intend to yield to the temptation presented to me by the defendants, but rather to attempt to save the pockets of the litigants by giving them my own views.

Many cases were cited to me to establish the various canons of construction which should be applied in the circumstances. It would serve no good purpose to recite them here, since most of them are exceedingly familiar. In order to simplify the correction of any errors I may have made in their application, I will set out, as I proceed, the rules as I understand them, and the application which I have made of these rules. In the first place, I apprehend that, if the words of the instrument have a primary or simple meaning, it is my duty to interpret them according to that meaning, without regard to any extrinsic or surrounding circumstances attendant upon the making of the instrument. Secondly, I understand that, if there be ambiguity as to the meaning of any phrase or part of the document, I should look to the other parts of the document and endeavour so to resolve the ambiguity as to give a coherent and

intelligible meaning to the whole. If it be possible to give the whole document an intelligible meaning, free from ambiguity, without reference to extrinsic circumstances, I ought still to refrain from looking outside the terms of the instrument for the purpose of its construction. Thirdly, if it be not possible to succeed in giving a coherent and intelligible construction to the whole document without reference to the circumstances attendant upon its execution, then, and only then, will it be right for me to take into account the extrinsic considerations to be collected from the circumstances in which Mr. Thomas drew and executed this codicil.

A It was agreed on behalf of all parties that, for the purposes of construction, the will of 1907 must be read into the codicil of 1931, since the latter expressly confirms the former. In the matter of interpretation, I have, therefore, taken the two documents to stand as one. Applying the tests which I have set out above, I have no doubt at all concerning the result of the first. It will be recalled that the first provision of the codicil is an express and detailed confirmation of the testator's will of Mar. 2, 1907. For the sake of convenience, I shall refer to this portion of the codicil as Part I thereof. The opening words of the next sentence, not divided by a paragraph from the first sentence, are as follow :

D If I survive my wife Margaret Thomas and inherit under her will any of the estate. . . .

This paragraph concludes with the following words :

I appoint the said Catherine Thomas sole executrix of this my will.

E I shall hereafter refer to this portion of the codicil as Part II. For my part, I am frankly puzzled as to the meaning and extent of this second provision. If, however, it be possible to read the last word " will " as a misnomer for codicil, there is nothing in this second provision inconsistent with the preceding provision confirming the original will. Even if I am allowed this latitude of construction, which is hardly consonant with the notion of construing words in their natural meaning, I am immediately thrown into doubt by the opening words of the next paragraph. This paragraph and the whole of the remainder of the codicil I shall refer to henceforward as Part III. The expression " Out of my own and separate estate I bequeath the following legacies " appears at first sight to have no reference at all to what has gone before, and one is immediately thrown into doubt as to whether this and the succeeding provisions which are thereafter variously referred to as " will " or " codicil " are intended, like the provision in Part II of the codicil, to be dependent upon the double condition of survival and inheritance, or whether they constitute a new disposition of his property, strongly at variance with the will of 1907, which is to take effect independently of the occurrence of the dual conditions. I have accordingly felt that even thus early I was driven to the second line of interpretation, and bound to look at the whole of the document to see whether I could find a coherent and intelligible interpretation without having recourse to the evidence

of the surrounding circumstances. Upon this line, counsel for some of the defendants pressed upon me with great insistence that it was perfectly possible to find such an interpretation, and that it was, therefore, my duty to interpret the codicil without looking outside it. He agreed, of course, that, by interpreting the second and succeeding paragraphs as a fresh testamentary disposition, independent of the dual condition contained in the first paragraph, very extensive changes would be made in the original disposition contemplated and provided for by the will of 1907. Notwithstanding, however, that this will of 1907 was expressly confirmed in the first sentence of the codicil, he contended that the whole document—namely, the will and codicil read together—could be given a satisfactory meaning if it could be found that the fresh dispositions effected by the codicil left over something which could be allotted to the universal legatee as constituted by the will. The most striking instances which he adduced were (i) a policy of insurance, (ii) a lordship of a manor, and (iii) heirlooms, all of which would still pass under the will to the universal legatee, notwithstanding that by a provision of the codicil “all other freehold and leasehold property investments and cash wherever situated” were left to 3 nephews and a niece. I appreciate that it is not necessary to show that the testator possessed any property or rights of the character imagined by counsel for some of the defendants in order to justify his reading, but I cannot understand how a reading of a document which allots only these remnants of property to a person therein described as a universal legatee and sole executrix can be said to be both intelligible and free from ambiguity. For my part, I can only say that it strikes me as almost fantastically fanciful, since, although it is true that the testator might have possessed such property, there seems to be no intelligible reason for the bequest of these unspecified assets to his wife, after having specifically deprived her of his business assets, his freehold and leasehold property, his investments, and all his cash, to say nothing of having appointed fresh executors of all the solid and tangible portions of his estate. To put the matter in another way, it seems to me that one can only resolve the ambiguity upon this line of reading by having recourse to a meaning which is so wildly improbable as in turn to fill one with doubt. Again, to test the matter by the words of LORD WENSLEYDALE in *Theelluson v. Rendlesham* (Lord) (2), this construction really leads to an “absurdity,” and also to “repugnance” and “inconsistency with the rest of the instrument.” Counsel for the intervenor pointed forcefully, as I thought, to the various difficulties which stood in the way of construing the will and the codicil together in the way contended for by the defendants. The will in the clearest possible terms bequeaths all the testator’s real and personal estate to his wife, and appoints her sole executrix. The codicil, on the other hand, whilst confirming the will, contains no revocation of the gift made by the will to the wife, but nevertheless bequeaths all his business assets, all his freehold and leasehold property, and all his investments

and cash to other legatees. In the absence of any words of revocation, I could not, for my part, feel that I had in any way fathomed the meaning of this apparent contradiction by holding that the devisees under Part III of the codicil should take everything mentioned therein, whereas the widow might take in her capacity as sole legatee anything which happened
A to remain over and above the very wide bequests contained in Part III. Again, too, there is the striking antinomy between the sole executrix in the will and the two new executors appointed by the codicil. Finally, although it may be true to argue that in law Part III of the codicil does not actually constitute a gift of residue, since the enumeration of the
B class of property bequeathed is not exhaustive, it is clear from the language used, more especially the expression "fall into my residuary estate," that the testator was under the impression that that very wide clause constituted a residuary gift.

Furthermore, for the purpose of determining whether I ought to allow
C myself to inquire into material extrinsic facts in order to interpret the ambiguity which, to my mind, exists in this document, I have consulted very extensively WIGRAM ON WILLS, 5th Edn., the well-known and authoritative work of SIR JAMES WIGRAM, V.-C., on this subject. I apprehend to the full that it is only in a very limited class of cases that
D extrinsic evidence could be admitted to show intention. These cases are carefully defined by SIR JAMES WIGRAM, V.-C., in VII at p. 110. Where, however, the ambiguity is as to a matter of meaning, as distinguished from intention, it seems clear that a court may inquire into material facts and arm itself with the knowledge of such extrinsic facts
E as to enable it to be in the same position of knowledge as that of the testator when he made his will. This point is emphasised by the second part of proposition V in WIGRAM ON WILLS, 5th Edn., p. 57, and later throughout the consideration of this proposition, notably in sect. 90, at p. 79, and sect. 96, at pp. 83, 84. Much impressed, therefore, as I was by
F the neat and able argument of Mr. Rees, followed and adopted by counsel for the sixth defendant, I have experienced so much perplexity and bewilderment in dealing with this oddly phrased, and, as it appears to me, self-contradictory, document that I have felt both entitled and bound to have recourse to the third line of construction, and to take
G account of the extraneous surrounding circumstances which might throw light upon the meaning to be attributed to the words used both in the will of 1907 and in the codicil of 1931.

Of the witnesses called before me, two of those called on behalf of the plaintiffs and one who was himself a defendant gave me material evidence
H on this head. Mr. George David, a solicitor, who acted for the testator to a considerable extent in business, told me something of the life history of Mr. and Mrs. Thomas, but he did not pretend to know anything of Mr. Thomas on the domestic side. He it was who prepared a fresh will for Mrs. Thomas on May 4, 1933, after her husband's death, whereby the intervener, Captain Caple, became entitled to her residuary estate.

Mr. David told me that throughout her survivorship of her husband Mrs. Thomas never referred at all to the existence of the codicil. He agreed, upon cross-examination, that Mr. Thomas was very friendly with his nephews, and was desirous of helping them. Mr. Frank Davies, who appears to have occupied the position of chief and confidential clerk to John Richard Thomas for the long span of 43 years, and who had known the testator and his wife ever since they were married, knew of no differences between husband and wife. Indeed, so far as is known, they appear to have lived in complete harmony, which the presence of Mrs. Thomas's sister in their home did nothing to disturb. Mr. Davies also agreed that Mr. Thomas was on good terms with his nephew Gwyn Thomas, and that the latter in recent years took an active part as salesman in his uncle's business. Mr. Davies did not agree to the suggestion that the testator had in any sense given up business, but he agreed that he needed help in the conduct of the business, and sought it from his nephew, Gwyn Thomas. Mr. Gwyn Thomas, whose full name is Edward Gwyn Thomas, told me that the testator took a particular interest in his brother and himself, and described the care which his uncle had shown for him during and after the War. He told me that he had commenced working with his uncle in Feb., 1921, and remained with him in business up to his uncle's death. During the last 3 years of his uncle's life, he (Gwyn Thomas) had done most of the selling, and, when he had suggested seeking another appointment, both the testator and his aunt, Mrs. Thomas, had shown strong objection, and had pointed out to him that he was destined to succeed the testator in business. It was much pressed in argument for the defendants that this extrinsic evidence told heavily in favour of the construction for which they contended. It was pointed out that, although mutual wills had been made in 1907, circumstances had changed much since that time. The marriage had proved childless. Mrs. Thomas had become herself a woman of fortune, and the testator, who was getting to be an old man, was concentrating his interest upon his nephews and nieces, more especially upon Gwyn Thomas, whom he had articed to his business, trained as an auctioneer, and encouraged in the belief that he would succeed to the business. Against this, as it seemed to me, it was even more forcibly contended (i) that he had lived in undiminished affection with his wife until his death, (ii) that there was no evidence to show that he wished to take anything away from the wife, to whom he had given everything, (iii) that the construction contended for by the defendants would be a gross and inexplicable breach of the implied agreement to make mutual wills which had been carried out in 1907, and (iv) that the manner of custody of the two mutual wills, as against the lack of care bestowed upon the codicil, pointed strongly against the suggestion that the codicil was ever intended to alter or supplement the will. Whereas the mutual wills had been carefully preserved in an envelope in the testator's safe over a period of nearly 30 years, the codicil was left in a place of no particular security, and, so far as the evidence

goes, was not brought to the attention of the wife. Counsel for the plaintiff, reinforced this argument by several points drawn from a consideration of the document itself. He pointed to the fact that the confirmation of the will is absolute. Moreover, as strengthening the idea that the wide bequest in Part III was intended to be a residuary gift, and thus in direct conflict with Part I, he pointed out that the fund constituted in Part III was charged with the payment of debts, and of the "testamentary expenses" of the testator. It may not be perfectly clear what this last phrase is intended to convey, but it does not seem to me unfair to infer that, in the hands of an amateur draftsman, the clause is one by which he might mean to constitute a residuary gift.

I have not in the consideration of this subject allowed my mind to dwell upon the fact that Mr. Thomas, the testator, was an amateur draftsman. As counsel for the plaintiff very fairly admitted, "meaning" only is the subject for my consideration. Whether the words employed were used by a lawyer or by a layman, their meaning would be the same. On the other hand, where one is searching for the meaning of phrases which are in themselves of uncertain significance, it is perhaps permissible to bear in mind that the individual who, in the particular instance in hand, is seeking to convey his meaning to others is employing a language which he only imperfectly understands. When, therefore, one reviews this document in the light of the material facts and extrinsic evidence, it is to my mind reasonably clear that the testator intended the whole of Part II and Part III of the codicil to be dependent upon his survivorship of his wife. I agree with the final contention of counsel for the plaintiff that the words which formed the opening of Part III provide a cogent argument in favour of the plaintiff's interpretation of the document, since a man does not, in normal circumstances, refer to "his own separate estate." These words, to my thinking, clearly link Part III to Part II of the codicil, and import that the first condition of Part II applies equally to Part III. For these reasons, I think that the plaintiff succeeds, and since the codicil really, in the circumstances, adds nothing to the will, and the will needs no republication or confirmation, there is no need for any declaration to be made. According to my findings, the codicil is inoperative, and the will, which is the only testamentary document to be admitted to probate, has already been so admitted.

Solicitors: *W. H. Martin & Alexander*, agents for *Geo. David & Co.*, Cardiff (for the plaintiff); *Cunliffe & Airy*, agents for *Yorath, Tudor & Jones*, Cardiff (for the second, third, fourth and fifth defendants); *Gregory, Rowcliffe & Co.*, agents for *J. Arnold Hancock*, Manchester (for the sixth defendant); *Armitage, Chapple & Co.* (for the intervener).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

STENNETT v. HANCOCK AND PETERS.

[KING'S BENCH DIVISION (Branson, J.), March 9, 10, 1939.]

Negligence—Dangerous goods—Liability of repairer—Repair of motor lorry—Accident on highway—Latent defect due to inefficient repair—Defect not discoverable on inspection—Novus actus interveniens.

The owner of a motor lorry took the wheel of the lorry, the flange of which had come off, to a motor repairer, with instructions to re-assemble it. The repairer's assistants re-assembled it and replaced it on the lorry, and the lorry owner's servant drove the lorry away. An hour or two later, the flange came off while the lorry was being driven on the highway by the lorry owner's servant, and, bowling along the road, it mounted the pavement and hit the female plaintiff, injuring her. There was no evidence that anything had happened between the time when the lorry was taken out of the garage and the time of the accident which might have caused the wheel to become dislodged :—

HELD : (i) following *Phillips v. Britannia Hygienic Laundry Co.* (1), the lorry owner having entrusted the repair of the lorry to a competent repairer, he was not liable for either negligence or nuisance to a person who suffered injury upon the road by reason of the competent repairer having been negligent.

(ii) the lorry owner, or the person who was going to take the vehicle on the road, was not under a duty to ascertain for himself, in so far as his capabilities allowed him to do so, whether the competent repairer had completely repaired the lorry.

(iii) following *M'Alister (or Donoghue) v. Stevenson* (4), and distinguishing *Earl v. Lubbock* (5), the repairer was liable to the person who suffered injury on the road as a result of his negligence, as he was in the same position as that of the manufacturer of an article sold by a distributor in circumstances which prevented the distributor or ultimate purchaser or consumer from discovering by inspection any defect in the article.

[EDITORIAL NOTE.] The question here is quite a short one, and it is whether the principle in *M'Alister (or Donoghue) v. Stevenson* (4) applies to a repairer. The point raised in this case is very similar to that in *Malroot v. Nozal, Ltd.* (1935), 51 T.L.R. 551 ; Digest Supp., but in that case the plaintiff in tort was a passenger in the motor vehicle. In the present case, the person injured was a pedestrian walking along the pavement. In both cases, the principle has been held to apply.

AS TO PRINCIPLE IN *M'Alister (or Donoghue) v. Stevenson*, see HALSBURY, Hailsham Edn., Vol. 23, pp. 632-634, para. 887 ; and FOR CASES, see DIGEST, Supp., Negligence, Nos. 361a-364l.]

Cases referred to :

- (1) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539 ; 26 Digest 433, 1514 ; 92 L.J.K.B. 389 ; 128 L.T. 690 ; *affd.*, [1923] 2 K.B. 832.
- (2) *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652 ; 26 Digest 432, 1512 ; 78 L.J.K.B. 1063 ; 101 L.T. 411.
- (3) *Tarry v. Ashton* (1876), 1 Q.B.D. 314 ; 26 Digest 433, 1519 ; 45 L.J.Q.B. 260 ; 34 L.T. 97.
- (4) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.
- (5) *Earl v. Lubbock*, [1905] 1 K.B. 253 ; 36 Digest 63, 408 ; 74 L.J.K.B. 121 ; 91 L.T. 830.

ACTION for damages for personal injuries to the female plaintiff and loss to the male plaintiff as a result of the alleged negligence of the

- defendants. On Mar. 6, 1937, the female plaintiff was walking along the pavement in High Street, Yiewsley, when the defendant Hancock's, motor lorry was being driven by his servant in the opposite direction to that in which the female plaintiff was walking, and the flange of one of the wheels of the lorry became detached and struck the female plaintiff, causing her injuries. The particulars of negligence alleged against the defendant Hancock stated that he caused or permitted the lorry to be driven when it was in an unsafe condition, owing to the flange of the wheel being insecurely fixed, and/or that he took no care to see that it was securely fixed, and/or that he failed properly to inspect the flange after it had been removed and placed on the wheel. The particulars of negligence alleged against the second defendant were that he employed unskilful and insufficiently experienced workmen, and/or that he failed to inspect the vehicle when finished, and/or that he exercised insufficient supervision. Nuisance was alleged in the alternative. The defendant Hancock in his defence alleged that the defendant Peters had been negligent and guilty of inefficient work in repairing the vehicle. The defendant Peters alleged that the wheel had received a severe blow since being repaired, and that that had put it out of adjustment. The facts and arguments are fully set out in the judgment.
- D *R. T. Monier-Williams* for the plaintiffs.
N. L. C. Macaskie, K.C., and *T. F. Southall* for the defendant Hancock.
E. Holroyd Pearce for the defendant Peters.

- BRANSON, J. : This case raises some interesting questions, and arises in the following way. On Mar. 6, 1937, the female plaintiff was walking along the pavement in the High Street, Yiewsley. The first defendant's motor lorry, driven by his driver, Walker, with the first defendant sitting alongside him upon the driving seat, was approaching from the direction opposite to that in which the female plaintiff was walking. Suddenly the flange which kept the tyre on one of the wheels of the first defendant's motor lorry became detached, and, bowling along the road, mounted the pavement and struck the female plaintiff's leg, bruising it severely and causing her a considerable amount of pain and injury. There is no doubt that she suffered a very severe bruising, and there is no doubt that she spent many weeks in bed. While she was so confined to bed, her husband, who is the second plaintiff, had to incur a considerable amount of expense in getting assistance in the house to do the housework and also to look after the child. Those various items have been agreed by both the defendants, and they amount to £51 15s.
- H The question of the amount of damages to which the female plaintiff is entitled against anyone who may be liable for this accident is confined to the damage which she can recover by reason of the pain and suffering and inconvenience which have been caused by this accident. I think that, so far as amounts are concerned, the husband is entitled to the £51 15s., and I think that the proper amount to pay to the wife for her pain, and

for the inconvenience to which she has been put, a certain amount of which is still being suffered by her, would be £150.

That is all fairly simple, but the next question which arises is whether either or both of the defendants is liable to pay the damages which, in my view, the plaintiffs have suffered. Dealing first with the first defendant, Hancock, who is the owner of the vehicle, in my view the case against him is concluded by the decision of the Divisional Court in *Phillips v. Britannia Hygienic Laundry Co.* (1). In that case, while a lorry was being driven in a public highway, a wheel came off it, owing to a defect in its axle, and damaged the plaintiff's leg. The statement in the headnote is as follows :

Two days before the accident, the defendants had received back the lorry from the makers, a firm of known competence, to whom it had been sent to be overhauled and repaired.

The county court judge before whom the action came found that the defendants were not negligent but that the repairers were negligent, and he gave judgment for the plaintiff, upon the ground that there had been a breach of the Motor Cars (Use and Construction) Order, 1904, art. II, reg. 6. The case came before the Divisional Court on appeal from the county court judge, and was heard by McCARDIE and BAILHACHE, JJ. They held that the regulation did not afford a cause of action, and they further held that the defendants did not, at common law, owe an absolute duty to the plaintiff to make sure that the lorry should be in a safe and proper condition, and that they were not liable for the alleged negligence of the repairers. They held that the lorry was not in itself a nuisance, and, therefore, that the plaintiff, having failed to establish knowledge or negligence on the part of the defendants, was not entitled to recover. In dealing with the question, first of all, of nuisance, McCARDIE, J. (who, at the request of BAILHACHE, J., delivered the leading judgment), said, at p. 555 :

Secondly, it was suggested that the defendants' lorry must, having regard to the defective axle, be regarded as a nuisance. Now it is plain that a motor car is not in itself a nuisance although liable to skid in wet weather : see *Wing v. London General Omnibus Co.* (2). It seems to me that the county court judge here did not find, nor could he properly have found, that the defendants' lorry was a nuisance. Such a finding would involve that the owner of every vehicle is liable for every latent defect causing injury, quite apart from any proof of knowledge or of negligence. So to hold would be contrary to the express or implied effect of the general body of decisions. In the case now before us the defendants did not know, nor did they negligently fail to know, of the defect in their lorry. It cannot, therefore, be said that they either caused, or in any way permitted, a nuisance.

Then he referred to *Tarry v. Ashton* (3). BAILHACHE, J., said, at p. 556 :

The remaining point is that there is a common law duty on the owner of a motor vehicle to have it reasonably fit for the road. In my judgment that is not a correct statement of the duty. Correctly stated the duty is to take reasonable care that the motor vehicle shall be fit for the road. That is quite a different thing from the duty to have it reasonably fit for the road. If the duty were to have it reasonably fit for the road it might well be that, although the owner of the vehicle had entrusted his repairs to a competent repairer, he would be liable to a person who suffered injury upon the high road if the competent repairer were negligent. If, on the other hand, the duty is, as I hold it is, to take reasonable care to have his vehicle fit, then that

duty is discharged by the owner of the vehicle who puts it into the hands of a competent repairer with instructions to do what is necessary to put it in a fit state to use the road.

Therefore he came to the conclusion that the appeal must be allowed.
Let me take that sentence :

- A If the duty were to have it reasonably fit for the road it might well be that, although the owner of the vehicle had entrusted his repairs to a competent repairer, he would be liable to a person who suffered injury upon the high road if the competent repairer were negligent.

- What is said here is that the defendant Hancock entrusted this vehicle to have this particular wheel repaired by a competent repairer, and it seems to me to follow from the language used in *Phillips v. Britannia Hygienic Laundry Co.* (1), and particularly from this passage from the judgment of BAILHACHE, J., that, if it appears as a matter of fact that he did entrust the repair to a competent repairer, he is not liable to a person who suffers injury upon the road by reason of the competent repairer being negligent. It is urged upon me by counsel for the plaintiffs that that statement of the law was sufficient for that case, but that I ought to add to it a further ingredient and hold that, although the repair has been entrusted to a competent repairer, there still remains upon the owner, or the person who is going to take the vehicle upon the road, the duty of ascertaining for himself, in so far as his capabilities allow him, whether the competent repairer has competently performed the repairs. I see no reason for putting that extra duty upon the owner of the vehicle. It might very well be, and in numerous cases, no doubt, is, the fact that the owner has not the remotest notion of whether or not the competent repairer has performed the repairs properly. It seems to me that it would be quite wrong to limit the protection given by *Phillips v. Britannia Hygienic Laundry Co.* (1) to a man who has entrusted his repairs to a competent repairer by superimposing upon it the duty of himself seeing that the repairs have been properly executed. Of course, it is easy to say that. There might be cases in which it would be plain to anybody's knowledge that the vehicle was in an unfit state, and I am not saying, of course, that there might not be cases in which the defect was so obvious that an uninstructed owner would observe it. What I do say, however, is that it seems to me, in view of the decision in *Phillips'* case (1), that it would be wrong for me to impose upon a person who has submitted his car to be repaired by a competent repairer a duty to look himself and see whether those repairs have been properly carried out.

- In the present case, upon the facts, the defendant Hancock had, a few days before this accident, delivered the wheel the flange of which came off, to the second defendant, Peters, with instructions to take off the cover and the inner tube, repair the puncture, and re-assemble the wheel. Peters, by his servants in his garage, did that work, and on the day of the accident the defendant Hancock came to the garage and this repaired wheel was placed upon the lorry by one of the operatives of the defendant Peters. In view of *Phillips'* case (1), it appears to me

that the defendant Hancock was thereupon entitled to drive away his lorry in the belief that Peters and his men had properly assembled the wheel and that it was perfectly safe and proper for him to drive the lorry upon the high road with that wheel attached to it. He did so. He did not look himself to see whether the wheel had been properly re-assembled. Neither does it appear that his driver did so. The lorry was driven away, A
and there is a dispute as to whether it was driven directly from the garage to the place where the accident happened or whether, before it got to the place where the accident happened, it had been driven around the town for an hour or so. In the view which I take of the case, it is really im- B
material whether the van was driven direct to the scene of the accident or whether it had been driven round perhaps for an hour, or even more. It can only become of interest in the case as giving in the latter event a longer opportunity for something to happen to displace the flange, even though it might have been correctly fixed by Peters' workpeople. Unless it could be shown that something happened to this wheel between the time when C
it left the garage and the time when the accident happened which ought to have caused the defendant Hancock to cease to trust to the correct assembly of the wheel by Peters' servants, it seems to me that he was entitled to continue so to trust to their having correctly performed the operation which they had undertaken. The only suggestion that any D
such thing did happen is that after the accident the policeman noticed that there was some grazing on the side of this wheel which indicated that it had been in contact with, and grazing along, the raised kerb of the street. That does not indicate, as it seems to me, any sort of happen- E
ing which ought to have shown Hancock that some damage might have been suffered by this wheel, or ought to have induced him to suspect that there was anything wrong. This is a standard fitting, and there must be numbers of vehicles of the same type continually striking their wheels against kerbs all over the country. If, every time one of these wheels F
touched a kerb, it became the duty of the driver to dismount and jack up the wheel and see whether this flange had been displaced from the slot which kept it in, these particular vehicles would not, it seems to me, be found to be used in any quantity upon our roads. I dismiss, therefore, the suggestion that anything happened between the time when the lorry was taken out of the garage and the time when this flange flew off. That G
being the case, in my view, the decision of *Phillips v. Britannia Hygienic Laundry Co.* (1) binds me to hold that the case against Hancock must fail.

I then come to discuss the position in regard to the defendant Peters. The case against him is put upon the principle of the decision of the H
House of Lords in *M'Alister (or Donoghue) v. Stevenson* (4). In that case, the manufacturer of an article which was sold by him to a distributor, in circumstances which prevented the distributor or the ultimate purchaser or consumer from discovering by inspection any defect in the article, was held to be under a legal duty to the ultimate purchaser or

- consumer to take reasonable care that the article was free from defect likely to cause injury. In the course of the case, the various previous decisions which bore upon the matter were subjected to a lengthy and very full analysis. It does not seem to me to be necessary to go into any details in following out that analysis, because, to my mind, the
- A principle upon which that case was decided applies to the present case in the following way. In this case, as in that case, there was an operation performed by a man who must have known, had he considered the matter for a moment, that it was an operation which, if he did not perform it properly, would probably result in injury to somebody upon
- B the road. He knew that the lorry was being repaired for the purposes of being used on the road. He knew that, if it was not repaired with due care, with this wheel so assembled as to make it keep together and not fly apart upon the road, in all probability somebody would be injured as the result of his not having done that which he should have done.
- C He knew that the second defendant was not going to take the wheel off or submit it to any scrutiny to see whether the work had been properly done. Therefore, it seems to me that every element which was considered by the majority of the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (4) to be necessary to render the maker of the article in that
- D case responsible to the ultimate user of it who was damaged thereby is present here. It is said that this is an extension of the principle laid down in *M'Alister (or Donoghue) v. Stevenson* (4), and that, instead of extending that principle, I ought to hold that *Earl v. Lubbock* (5) really governs the case before me. I do not think that it is possible for me to come to
- E that conclusion, in view of the fact that *Earl v. Lubbock* (5) was treated in the Court of Appeal as a case which really turned upon contract. Counsel for the second defendant has strenuously argued that it was not so, but it seems to me, to go no further into the matter, that the way in which the case was stated by MATHEW, L.J., at p. 259, is
- F conclusive :—

The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that any one in their employment, or, indeed, any one else who sustained an injury traceable to that negligence, had a cause of action against the defendant.

- G This case has not been put in that way at all. It is not suggested that by reason of the negligent performance of a contract Peters is liable to the female plaintiff. What is said is that he is liable by reason of his negligently repairing a vehicle which he knew was going to be used upon the road, and which he knew would, if so used, be liable to inflict injury
- H upon a passer-by. That is a different matter altogether. That, as I have said, seems to me to come within the principle of the decision in *M'Alister (or Donoghue) v. Stevenson* (4). I think it right to say that, if, upon the facts of the case, it had appeared that Hancock should reasonably have examined the wheel before putting it into use, and had failed to do so, then there would be a *novus actus interveniens* which would break the

continuity necessary to make Peters liable to the female plaintiff. I cannot think, however, that it would be right to say (as I have already said) that a person who employs a skilled and competent repairer to repair his vehicle is omitting any duty which he owes to himself or to anybody else if he trusts to that man having done his work properly, and, in reliance upon that, takes the vehicle upon the road. A

That leaves the question whether or not the accident here was due to the negligence in the re-assembling of this wheel of anybody for whom Peters was responsible. Having come to the conclusion that there is no evidence of anything having happened to the wheel sufficient to dislodge the flange if it had been properly fitted, one is driven to the conclusion that, as it came off, it could not have been properly fitted. It is all very well to say that the witnesses Peters and Bryant and Weaver were all perfectly honest and upright people. I have not the least doubt that they were. Nobody has said that they deliberately sent out this wheel not properly assembled. Bryant, who did the assembling, I have no doubt thought, when he had finished it, that he had properly assembled it. If he had not, he would have done it again. However, all that that means is that, from some carelessness or some slip, he failed to do that which he should have done, and failed to notice that the flange was not properly fixed into the slot in the wheel which was intended to hold it in position. There has been some doubt in the case as to the particular kind of wheel which was fitted to this particular lorry, and the doubt arises from the fact that Peters and his witnesses say that the wheel was of the type which has been produced in court. However, Mr. Brooks, who was called as a witness for the defendant Hancock, says that the wheel which Hancock brought to him as the wheel which had been through the adventure was not of this type at all, but was a slightly different type of wheel. In so far as it may be necessary to come to a conclusion as to which of these two sets of witnesses is correct in the matter, I am inclined to think that the wheel was of the description which Peters and Bryant described, because I think it possible that there may have been some muddle as to the wheel which was taken to Brooks after the accident. Brooks only saw what was brought to him after the accident, and Peters and Bryant actually worked upon the wheel, and Peters and Weaver were there when the wheel was attached to the vehicle. Thus, I think that it is more likely that their recollection would be correct than that those of Brooks would be. However, the effect of such a decision is, in my opinion, rather to help the defendant Hancock than to hurt him, because the only evidence that there was anything in the matter of the wheel which might have excused a bad fitting of the flange at Peters' garage comes from Brooks. He says that the wheel which he saw had a number of hammer marks, and that the slot was bent in a bit in places. If that had been the condition of the wheel when it was taken to Peters, and when Bryant was engaged in re-assembling it, it seems to me impossible that Bryant would B C D E F G H

not have complained and said: "The slot of this wheel is in such a condition that I cannot safely fix the flange." Nothing of the sort took place, and, if indeed it be true that Bryant is the careful man I think him to be, though I am finding that in this particular case he failed, he and Peters must have called attention to the fact that the slot was in such a condition that the flange could not be properly fitted into it. However, whatever the reason, as I have said, I think that the cause of the trouble was the inefficient and careless re-assembly of the wheel by Bryant, and, for the reasons I have given, I think that the plaintiffs are entitled to recover against Peters. I can only say in conclusion that, if it were not so, it seems to me that there would be a sad *lacuna* in the law. My judgment is that the first plaintiff recover £150 and the second plaintiff £51 15s. from the defendant Peters.

Solicitors: *Simpson, Palmer & Winder* (for the plaintiffs); *Wm. Easton & Sons* (for the defendant Hancock); *Savage Cooper & Wright*, agents for *Wilson A. L. Houlder & Co.*, Southall (for the defendant Peters).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

D **Re AN ARBITRATION BETWEEN A/S. TANK OF OSLO AND
AGENCE MARITIME L. STRAUSS OF PARIS.**

[KING'S BENCH DIVISION (Atkinson, J.), **March 29, April 4, 18, 1939.**]

E *Shipping—Charterparty—Ship to "proceed (as ordered on signing bills of lading) direct to one safe port"—Option to discharge at two safe ports for small additional freight charge—Option exercised before bills of lading signed but by mistake not communicated to master or charterers' factors at loading port—Master signing bills of lading for one port only—Meaning of words "on signing bills of lading"—Mistake—Estoppel.*

E The respondents chartered the ship *James Hawson* to proceed to Philadelphia, there load a cargo of oil from the charterers' factors, and then "proceed (as ordered on signing bills of lading) direct to one safe port east coast United Kingdom or on the Continent." The charterparty contained a clause giving the charterers the option of discharging at two safe ports as mentioned above, and, in the event of this option being exercised, they were to pay a small amount of extra freight. After considerable correspondence between the parties, it was finally agreed, on the day before the ship arrived at Philadelphia, that the charterers, in exercise of their option, should discharge first at Bordeaux and then at Havre. This arrangement, however, was not notified by the owners to the master, or by the charterers to their factors, and accordingly the master, on arriving at Philadelphia, cabled the owners' agents stating his sailing date, and adding that Havre was the only discharging port. He subsequently signed bills of lading for this port. H The owners' agents, on receiving this cable, suspected that a mistake had been made, and, after various communications had passed between the parties, the ports of discharge were finally verified, and the master was ordered to proceed accordingly. It was thereupon contended by the owners that there had been no proper exercise of the option, as the words "proceed (as ordered on signing bills of lading) direct to one safe port" must be construed strictly, and meant that the order had to be given to the master while he was in the act of signing the bills of

lading, and therefore could only be given by the factors at Philadelphia:—

HELD: (i) the charterparty, being a commercial document, had to be given a reasonable meaning, and the business meaning of the words “as ordered on signing bills of lading” was “as ordered not later than, or before signing bills of lading.” Within a reasonable time of the signing of the bills of lading there had been an exercise of the option in a way which was agreed to by the owners.

(ii) it was known by all parties that a mistake had occurred in notification of the ports of discharge, and the charterers were not estopped from denying that the destination indorsed on the bills of lading was the proper destination.

[EDITORIAL NOTE.] The general rule for the construction of documents is that the grammatical and ordinary meaning of words must be adhered to, but, where that leads to a capricious and irrational result, the rule may be departed from. This departure is more easily made in a commercial document, in which words and expressions have to be given a reasonable meaning.

AS TO CONSTRUCTION OF CHARTERPARTIES, see HALSBURY, Hailsham Edn., Vol. 30, pp. 365-370, para. 542; and FOR CASES, see DIGEST, Vol. 41, pp. 305-309. Nos. 1670-1703.]

CASE STATED by an arbitrator for the opinion of the court as to the construction of a charterparty. The questions and the facts are fully set out in the judgment.

H. M. Pratt for the claimants.

C. T. Miller for the respondents.

ATKINSON, J.: This case raises quite an interesting point. The dispute arises on a charterparty which was made between the owners, who are the claimants in this arbitration, and the charterers, Messrs. Strauss, of Paris. The material parts of the charterparty are these. The ship which was being chartered, the *James Hawson*, was to proceed to a safe port in the United States, which ultimately became Philadelphia:

... and there load from the factors of the said charterers a full and complete cargo of refined petroleum and being so loaded shall therewith proceed (as ordered on signing bills of lading) direct to one safe port east coast United Kingdom or on the Continent. . . .

Clause 26 of the charterparty provided as follows:

Charterers have the option of discharging at two safe ports as above and in the event of this option being exercised charterers are to pay extra freight as follows. . . .

The dispute arose in this way. Apparently Havre had been understood to be the port of discharge. It is not very clear how or when Havre had been mentioned, but, at the time the material letters began to pass, it is obvious that Havre was in the minds of the persons concerned as the port of discharge. Then certain letters passed, which I will refer to in a moment, which are said to constitute a good exercise of the option conferred upon the charterers under cl. 26. By some mistake, probably through neither the charterers notifying one of their factors in Philadelphia nor the owners notifying their master, the bill of lading presented for signature had only the single port, Havre, in it. The owners sought to take advantage of this, and disputed the right of the

charterers to have the oil discharged at two ports without extra payment. The charterers claim that their option was properly exercised, and exercised in a way which was accepted by the owners, and that the slip or mistake which was made in Philadelphia did not affect their contractual rights, and, therefore, that the only extra payment to which the owners were entitled was the payment specified in cl. 26. That roughly indicates the dispute.

It is necessary first, in my opinion, in order to form an answer to the questions asked by the arbitrator, to consider the letters and see what happened. On Jan. 8, 1937, Messrs. Strauss, the charterers, wrote a letter, I think to the owners, or, at any rate, to their managers in Oslo. It was written in French, and there is some dispute as to the proper translation, but, of course, I must accept the arbitrator's translation of that letter, which is as follows :

In pursuance of the above-mentioned charterparty we have pleasure in informing you hereby that we declare as to the present, an option extra port Bordeaux.

That was on Jan. 8, and Messrs. Matthews Wrightson (Shipping), Ltd., who were the London agents of the owners, wrote to the owners on, I think, Jan. 13, as follows :

Our friends write us under date of 8th inst. as follows : " We enclose herewith two letters for the owners giving them instructions about discharging ports, which should be Bordeaux first, Le Havre second, although this is not specified in the enclosed letters, which are exact copies of those received from our charterers. Kindly understand that although they will take the ship, although she will be late, they are maintaining all reserves. . . " We enclose original letters addressed to owners by Agence Maritime L. Strauss, dated Jan. 8.

The arbitrator has taken the view that that letter was only a provisional exercise of the option because of the expression " as to the present." A week later, however, what was possibly provisional became very much more emphatic, because the charterers wrote, I think, to Messrs. Matthews Wrightson (Shipping) Ltd., as follows :

We confirm you our letter of the 8th inst. requesting you to advise owners that the boat should first discharge at Bordeaux a first lot, and then, after, go to Havre to discharge the balance of the cargo.

When Messrs. Matthews Wrightson got that, they cabled to the owners as follows :

James Hawson. Must have Havre first discharging port. Please confirm.

I infer from that that probably there had been some telephone conversation, or some document which has not been produced, in which the owners had already indicated that they preferred the ship to go to Havre first and Bordeaux later. On Jan. 19, Messrs. Matthews Wrightson write to the charterers as follows :

With further reference to your favour of the 15th inst. James Hawson. In accordance with your advices, we have informed owners that this vessel will have to discharge first at Bordeaux and then at Havre as second port. . . . We are informed that this vessel is due to arrive at loading port on the 21st inst. . . . We would refer you to our letter of yesterday quoting telegram we have received from owners and are now awaiting your reply.

P.S.—Thank you for your 'phone call from which we note that charterers agree to owners' stipulations.

Then on Jan. 19 Messrs. Matthews Wrightson wire to the owners' agent at Oslo as follows :

James Hawson. Your telegram just received. Charterers instruct vessel discharge Bordeaux and Havre in rotation mentioned. What is the objection ? Referring your telegram charterers agree. A.

It is not clear what the telegram of yesterday was, because it does not seem to be here. Then there is a further telegram of the same date to the owners themselves :

Please note charterers confirm that this vessel will have to discharge first at Bordeaux and then at Havre. B

It is difficult to see how an instruction could be put in more definite and plain language than that. There is nothing provisional there. The vessel would have to discharge first at Bordeaux and then at Havre. Then apparently the owners instructed Messrs. Matthews Wrightson to agree to that, subject to a condition, because on Jan. 20 they telegraph again as follows : C

James Hawson. Referring your telegram yesterday owners agree discharging in rotation mentioned rely on quick despatch for loading and discharging.

Obviously there was a telephone message that day between Messrs. Wrightson and the charterers whereby the charterers agreed to this condition, because on the same date, Jan. 20, there is a letter to Messrs. Strauss as follows : D

James Hawson. In accordance with telephone conversation of yesterday, we telegraphed to owners that you agree the conditions of their telegram. For your guidance, when we informed owners that the discharging ports would be Bordeaux and Havre, they objected (they did not say why, but we presume it was on account of the possibility of there not being sufficient water at Bordeaux) but from a telegram we have this morning, they say owners agree to discharge Bordeaux and Havre in this rotation, but they rely upon charterers giving the vessel a quick despatch both for loading and discharging. Will you please inform Mr. Modiano accordingly. E

That letter, I suppose, would arrive in Paris on the evening of Jan. 21, or the early morning of Jan. 22, and the charterers would then have in front of them this written agreement by the owners as to the ports at which the ship was to discharge and the order in which she was to discharge at those named ports, and they knew that they themselves had undertaken to see that there was quick despatch at Bordeaux. That was Jan. 22, and was the very day they had been told the ship was expected to arrive at Philadelphia. Indeed, the day after, they had been informed that the ship was expected at the loading port about Jan. 21, so on the very day, or the day after they had been told the ship would arrive, they received the perfectly plain statement, as it seems to me, that the owners agreed to discharge at two particular ports in a particular order. Unfortunately, nobody took the trouble to notify Philadelphia of what had happened. It seems to me that the contract between the parties had then become a contract under which the ship was to discharge at those two ports. The option had been exercised in a way which, at any rate, had not been F
G
H

objected to by the owners, and in a way to which they had assented. It seems to me that the obligation at that moment upon the owners was to see that the ship was discharged in the way agreed, and, if that was their obligation, it was surely their obligation to notify the person who alone could carry out the obligation—that is, the master of the ship.

- A They failed to notify him at all, and the charterers apparently failed to notify their factors of the change which had been made, probably relying on the owners to notify the master. What happened was—there is a good deal of surmise about what might have passed between the shippers and the master—that the bill of lading which was presented
- B to the master for signature only specified the port of Havre, and the master signed it. On Jan. 22, however—that is, the day he had gone there—he cabled to the owners' agents at Newcastle and also to the owners' managers at Oslo. To the Newcastle agents he said :

- C Arrived Friday morning, expect to sail Sunday, telegram of Jan. 18 one discharging port. received

To the owners' managers he telegraphed :

Arrived Friday morning, expect to sail Sunday. Allotment to motorman Romnes. One discharging port Havre.

- D I do not know what "motorman Romnes" means. The owners, who had within a day or two, after quite a considerable amount of correspondence, arrived at a definite agreement as to where the ship was to discharge, at once suspected that there had been a mistake. Who notified Matthews Wrightson does not appear, but on Jan. 23 Matthews Wrightson wrote
- E to the charterers. They might just as well have telegraphed, when they would have got an answer the same day, but they wrote as follows :

You will recollect that you told us this vessel would have to discharge at Bordeaux and Havre in this rotation, but according to cable which our friends have received from Philadelphia, the James Hawson arrived on the morning of the 22nd, and is expected to sail to-morrow (Sunday) for Havre, which will be the only discharging port. We shall be glad to hear if this information is correct.

- F That was probably written as the result of the following telegram from the owners' manager at Oslo to Matthews Wrightson :

James Hawson. Captain telegraphs Havre only discharging port. Is it correct ? Telegraph.

- G They were in a hurry, but obviously they suspected a mistake. Instead of telegraphing, however, Matthews Wrightson merely wrote to Paris. The charterers received that letter on Jan. 25, when they at once rang up the owners' London agents and told them it was a mistake, and cabled to Oslo as follows :

- H Charterers wish you to instruct captain to proceed to Bordeaux then Havre. Acknowledge.

They wrote to the owners the same day as follows :

With reference to your telegram of to-day, advising captain telegraphs Havre is to be the only port of discharge, we beg to advise you that we have already heard a rumour to this effect, and have communicated with charterers to find out if the

boat will discharge at Havre only, or Bordeaux and Havre as per their advices.

P.S.—Paris just 'phone requesting us to telegraph you to order the captain to proceed to Bordeaux and Havre. Please acknowledge.

The charterers confirm that telephone message on the same day in the following terms :

Contrary to the terms of your letter of the 23rd inst. informing us that the James A
Hawson had received instructions in Philadelphia to sail for Havre only discharging
port, kindly note that our instructions have not been altered and that the boat
should go first to Bordeaux and after that to Le Havre.

The necessary instructions were given to the master. There were some
letters reserving all rights of everybody, and the question then arose B
whether the owners had the right to say : " You have lost your right to
have this oil discharged at two ports for the slight additional charge
specified in the charterparty. The service which we have rendered you
has been done quite outside that, and we are entitled to charge you some
hundreds of pounds for the extra services involved."

Those are the facts, and the view which is contended for by the owners C
is this. It is said that, as a matter of construction, the words in the
printed part of the charterparty " and being so loaded shall therewith
proceed (as ordered on signing bills of lading) direct to one safe port " D
mean precisely what they say, and mean that the order has to be given
to the master while he is in the act of signing the bill of lading, and that
an order given at any other time is wholly ineffective and a nullity. E
Further, they say that the only order in this case which complied with
that requisite was the order which was in fact contained in the bill of
lading. It is contended that those words " as ordered on signing bills
of lading " mean precisely what they say, and that the only order which F
could be effective within this contract was an order given literally at the
time of the signing of the bill of lading. I think that it is necessary to
construe those words in order to answer one of the questions in this
case. It is also argued by the owners that those words appearing in
cl. 1 govern cl. 26. Clause 26 was the clause which gave the charterers G
the option of discharging at two safe ports, and, in the event of this
option being exercised, the charterers were to pay certain freight. It is
said again that the only time at which that option could be exercised
was on the signing of the bill of lading, that the only place at which it
could be exercised was the place where the bill of lading was signed, and
that the only person who could exercise it was the factor in
Philadelphia, who alone would be present when the bill of lading was
signed.

The charterers' reply to that is, first, that in cl. 26 there is not a word
to indicate that. There is nothing there to say when their option is to H
be exercised, or how it is to be exercised. There is nothing there incor-
porating those few words in brackets in cl. 1, and they say that that is an
option which they are free to exercise themselves—direct, if they so elect.
Further than that, however, they say : " Even if the two clauses are to
be read closely together in that way, in this particular case, we exercised

our option in a way which was received and accepted by the owners in a perfectly final, clear and definite way, and if it was not exercised precisely in the way indicated in the charter, at any rate it was exercised in a way accepted and agreed to by the owners and in a way which, therefore, became binding upon them." That, as far as I can see, summarises

A the two contentions.

The two questions which have been asked are these. First, it is asked whether, upon the facts as found by me, and upon the true construction of the documents, orders for the discharging port or ports must be given at the time of signing bills of lading. That question is directed,

B of course, not merely to the single port, but to port or ports. In other words, the question, as it seems to me, raises the point whether or not the only way of exercising the choice of a certain port, or the only way of exercising the option of choosing two ports, is one which must be exercised at the time of signing bills of lading. My answer to that is: "No." I

C cannot construe the words "as ordered on signing bills of lading" as meaning at the time of signing bills of lading, in that strict way which is contended for. After all, this is a commercial document, and has to be given a reasonable meaning, and it is quite obvious that, from the owners' point of view, the sooner they know where their ship has to go the

D better. I should have thought that the business meaning of these words was "as ordered not later than, or before, signing bills of lading"—at any rate, not later than the signing of the bills of lading—an order which must be given by the time the bills of lading come to be signed. I think that that is what it means, because it protects the owner. He then

E knows before the ship sails where he has to go, and in that way it gives the charterer as much time as can reasonably be given to him. He has to make up his mind beforehand, and he has to give his order not later than the signing of the bills of lading. It seems to me that it is impossible to construe a business document in the way contended for, and to say

F that it really means that, at the very moment the bills of lading are being signed, somebody has to be standing beside the master's shoulder and declaring where the ship has to go. That is what I imagine to be the reasonable meaning of those words, and that is, at any rate, applicable to the single port. I am not satisfied at all on this charter that the

G option as to discharging at two safe ports is governed by those words. I am not satisfied about that, and, after all, the burden is, I suppose, on the claimants in this case to begin by showing what clear contractual burdens are imposed upon the person against whom they are claiming. It seems to me that, if the words "as ordered on signing bills of lading"

H have the rigid and definite meaning contended for, I am far from being satisfied that it is right to say that this option has to be satisfied at that moment and at no other moment, and at that place, and at no other place—that is, Philadelphia.

It seems to me that the option given in cl. 26 can be exercised in any reasonable way, and certainly before the sailing of the ship. Afterwards

would not be reasonable, but certainly before the sailing of the ship. In my judgment, really, all those questions scarcely arise, because I have the clearest view that on those letters there was an exercise of the option in a way which was received and assented to and agreed to by the owners, who agreed to it with the benefit of a stipulation they made for quick discharge at Bordeaux. However, there it is agreed to in writing, and agreed to just about the time when the ship was due to arrive. In other words, it was agreed to within a very reasonable time of the signing of the bills of lading. The importance of that, to my mind, is this. If the option was properly exercised in a way which was accepted and agreed to by the owners, then there arose at that moment a contractual obligation to discharge in that way. Then one has to consider the effect of that clear agreement contained in the letters stating what happened at Philadelphia. If everything that happened up to then had been purely provisional—of course, this is all subject to what may be told the master—different considerations might arise, but, if there is a clear agreement like that, one has to see that the people who are supposed to vary that agreement have some authority to do what they are supposed to have done. Let us take it that the factors, believing that the goods had to go to Havre, told the master that they had to go to Havre, and let us take it that the master believed that they had to go to Havre, and signed the bill of lading accordingly. Before the ship sailed, the owners knew of this. It is clear that they suspected a mistake, and they at once asked the charterers: "Is this right or wrong?" They were at once told on the telephone: "No. This is a mistake. You have to stick to the arrangement which is made." I am satisfied that it was a mistake, that everybody believed that it was a mistake, and that nobody thought for one moment that the option was being exercised, or an order was being given which was meant to be a final and binding order. It really deceived nobody. It had no effect. It did not put the owners to a farthing's expense, except a cable or two here and there, and was wholly inoperative to defeat the option which was exercised in the way it was in these letters. That is the view which I have formed of this case, and, therefore, orders exercising the option under cl. 26 have not necessarily to be given at the time of signing the bills of lading.

The next question is as follows:

When bills of lading are presented by the charterers' factors indorsed for a different destination, have the charterers thereby altered or waived any earlier orders given by them?

The answer to that is "No," in this case, because the question is asked upon the facts of this case. In my view, when the bills of lading were presented by the charterers' factors indorsed with the destination of Havre, they did not alter or waive the earlier orders and agreement which had been arrived at as to where the goods were to be discharged. I have given my reasons. Everybody suspected a mistake, and at once knew it was a mistake, and I am satisfied that the charterers are not

estopped from denying that the destination so indorsed is the proper destination. I think in this case that the services rendered were services provided for by the charterparty, and that all the charterers had to pay was the price agreed upon in the charterparty for this service, and that there is no warrant whatever for the owners seeking to take advantage of what
 A they knew to be a slip to extract this very large sum of money from the charterers.

Solicitors : *Sinclair, Roche & Temperley* (for the claimants) ; *Thomas Cooper & Co.* (for the respondents).

B [Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

LYNCH *v.* LYNCH.

C [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
April 27, 1939.]

Divorce—Desertion—Previous nullity suit abandoned and believed to be dismissed—Petition inadvertently left on file—Subsequent cohabitation—Whether desertion continuing.

D The parties, who were married in 1915, were both members of the theatrical profession and lived together only at such times as their professional duties permitted. In June, 1924, the wife presented a petition for nullity, but, upon advice received, she discontinued those proceedings in July of that year. Both parties thought that the petition had been dismissed and taken off the file, but, when a petition for divorce was filed in 1938 founded on desertion, it was found that the former
 E petition was still on the file. The parties had lived together at various times since 1924, and the desertion was alleged to have commenced in 1933. Apart from the position arising from the presence of the former petition on the file, there was no question as to the fact of desertion :—

F HELD : the husband was not entitled to take advantage of a fact of which he was wholly ignorant, and, as he ignored it for the purpose of enjoying the society of his wife, he could not now rely upon it as a bar to a decree. The wife was entitled to a decree *nisi* for divorce.

[EDITORIAL NOTE. The difficulties which have arisen in coming to a finding of desertion by reason of the existence of a petition on the file of the court are well known. The position is here reduced to the merest technicality, since its presence
 G on the file had passed out of the mind of each of the spouses, and, indeed, they had been living together, as far as their work permitted, during the earlier part of the time while it was so on the file of the court. In the circumstances, it is held that its presence there can be ignored, but this case must be read subject to the decision of the Court of Appeal in *Cohen v. Cohen*, reported on p. 596, *post*.

H AS TO EFFECT OF PETITION ON DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 658, 659, paras. 968, 969 ; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

UNDEFENDED PETITION by wife for dissolution of marriage on the ground of desertion for 3 years immediately preceding the presentation of the petition. The facts are fully set out in the judgment.

C. L. Beddington for the petitioner.

HENN COLLINS, J. : In this case, the husband and wife were married on Aug. 14, 1915. They were both members of the theatrical profession, and they lived together as and when the exigencies of their profession permitted down to June 24, 1924, when the wife presented a petition for nullity of the marriage. That petition was served on the husband, and went forward in the ordinary way until July, 1924, or thereabouts, A when the wife, on advice which she had received, instructed the solicitor who was then acting for her to get the petition dismissed. She seems to have thought no more about it from that date onwards. The spouses did not come together again, not, as I think, because they were antagonistic, but because the exigencies of their calling required them to be in different places—abroad and in England. In Aug., 1928, they were B offered a professional engagement in which they might both appear together, either in the same company or as partners in an act. They embraced that opportunity, and they both joined the same theatrical company and played in it. During that time, they lived together as C man and wife in the sense in which they had originally done so. That continued for a period of 3 months. During that time, the wife was shown by her husband a letter which he had received from his solicitors—the solicitors acting for him in the nullity suit—which made it clear that he, the husband, and the respondent in this case, had been notified D that the petitioner, his wife, was not going on with the nullity suit. Of course, it is impossible for the wife at this length of time to repeat exactly what was in that letter, or what particular words were used, but she has satisfied me that it was sufficient to give the husband notice that he need concern himself no more with the existence of that suit. E After 3 months together, the husband lost his post in the theatrical company and obtained work elsewhere, while the wife continued in the company. They did not thereafter meet until July, 1930. By that time, or rather for a week in July, 1930, the wife was not working. The husband was at Birkenhead, and, as she was out of work, she turned F to him for support. She went to Birkenhead, and they again lived together peacefully for that week. She then resumed her profession, as he resumed his, and they worked apart by reason of the exigencies of their profession. If the matter rested there, merely upon the question of fact whether there was desertion, I should be inclined to say that G there had been none. I think that the proper inference upon the facts so far is that they were living apart, in so far as they were apart, by reason of their separate professional activities, and not as against the will of the other. In 1933, however, the petitioner ceased to be upon the stage, and was therefore left to her own resources. She does H not appear at any time to have kept in close touch with her husband, or he with her, but in Sept., 1933, having heard that he proposed to start a theatrical agency, she went to Birmingham, where he had a permanent address (at his parents, I believe), and saw him there. She there asked him to set up a home with her, to which his reply was that

he would go on as they were for a bit, and would see about it. He never did, in fact, see about it, and he never communicated with her again. In 1934—that is to say, some time in the following year—his wife wrote to him and said she was unhappy—she was living with her parents—and wanted to see him, to which his reply was again, from Birmingham, that he was trying to fix up work in Birmingham and could not get down to Hounslow to see her. It occurs to me that, if the suggestion of seeing his wife was one which commended itself to him, nothing would have been easier for him than to send the money down to his wife for her to go to him, and I regard his statement that he was trying to fix up work in Birmingham and could not get down to see her as a mere specious excuse, coupled with the fact of his extremely cold reception of her original plea in 1933 that they should set up home together and his lapse into silence thereafter. I think that the proper inference on those facts is that he had an intention to desert his wife, and that that intention had effect in his complete failure to support her. In those circumstances, I think that there was, in fact, desertion by him.

That is always subject to the difficulty which is raised by the fact, which was unknown to both spouses, that the nullity suit, now some 14 years old, had not, in fact, been dismissed. In spite of the wife's instructions to the solicitor who was then acting for her, it had remained on the file. That raises a point of some difficulty, because *prima facie* the presence upon the file of a suit for nullity, or for a judicial separation, or for divorce, has the effect of an order upon the spouses to keep them apart, and, so long as that is so, it can be urged by either spouse charged with desertion that he or she, as the case may be, has obviously a lawful excuse for not rejoining the other spouse. In this case, however, both the spouses believed that there was no such bar. In fact, both believed that the suit had had a technical, as well as a practical, end. In those circumstances, what is the position in law? Desertion is fundamentally, apart from actual acts, a question of intention. So far as one can be certain of anything which operates in the human mind, one can be certain of the fact that the existence of that suit on the file (a matter of which the husband in this case knew nothing) cannot in the very least have affected his conduct at any time, much less after Sept., 1933. Therefore, if it is to stand in the way of the wife on her present petition, it is a mere technicality, and one brought about by circumstances for which she is not in the least responsible. However, I must not let considerations of that kind weigh with me in considering the law applicable in the circumstances. None the less, one not unnaturally approaches it from the point of view that one assumes, if possible, that the law does not work hardship. It seems to me that the right way to regard this question is to treat the matter as though it were pleaded. That does not mean that the court can secure, as it were, any advantage from bad pleading, or assume anything not to be pleaded which ought to be pleaded, or anything to be pleaded which ought not to have

been pleaded, but that, having ascertained the fact, it can then *ex post facto* draw the inference. I think that, if that hypothesis is applied in this case, the result will appear to be that the husband was not inclined to rely on the appearance on the file of the nullity suit. I think that the right way to regard it, now that I know the facts, is to treat them in some such way as this. The petitioner starts by saying: "You, my husband, deserted me in or about Sept., 1933, and that desertion has continued down to the date of the petition." To this the husband notionally answers: "But during the whole or some material part of that time, and in particular during the latter part, the last 3 years, I was precluded from rejoining you as your husband by reason of the existence on the file of the court—had I the curiosity to go and look there, which I had not—of a suit for nullity." To this the wife would plead in answer: "You, by your conduct, are estopped or precluded from doing any such thing, because you have over a period since that petition was upon the file (for two periods to be accurate) enjoyed my society and *consortium* as your spouse, and you cannot, in the language of the common law, blow hot and cold." In that state of things, the issues raised by those pleadings came before this court. What is the proper decision on that state of pleadings, pleadings which have the singular advantage, one observes, of being drafted after the facts are ascertained? My answer is that the wife's replication is well founded. The husband is not entitled to take advantage of a fact of which he was wholly ignorant. It did not affect his conduct in the least, and, even if he did know of it, he disregarded it for the purpose of enjoying the society of his wife. That is a view, of course, which is founded on the fact that the existence of the suit did not affect the spouses' minds in the least. As I have already indicated, if the existence of the suit did constitute a bar, it would be the merest technicality, and one in respect of which, in so far as I had any discretion in the matter, I should not exercise discretion in favour of the husband. The result is that I think the petitioner is entitled to her decree.

Decree nisi granted.

Solicitors: *Rye & Eyre* (for the petitioner).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

COHEN v. COHEN.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Macnaghten, J.), May 2, 1939.]

Divorce—Desertion—Previous proceedings for divorce abandoned—Whether period of desertion continues to run—Matrimonial Causes Act, 1937 (c. 57), s. 2.

The petitioner sought a divorce on the ground that her husband had deserted her for a period of at least 3 years immediately preceding the presentation of her petition, which was dated Mar. 2, 1938. The

husband had deserted the petitioner in 1925. On Mar. 21, 1930, the petitioner had presented a petition for divorce based on adultery, which petition was dismissed on May 14, 1937, on her application. She presented a further petition on May 25, 1937, also founded on adultery, which petition was dismissed on Mar. 1, 1938, on her application. Both these earlier petitions had been served on the respondent :—

- A HELD : the presentation of the earlier petitions, and their continuance on the files of the court, prevented the period of desertion from running. *Stevenson v. Stevenson* (1) followed.

[EDITORIAL NOTE.] The position here considered by the Court of Appeal has been before the court of first instance on several occasions, and the Court of Appeal have affirmed the general trend of the decisions of the lower court that the matter is governed by the decision of the Court of Appeal in *Stevenson v. Stevenson* (1). The lower court in *Lynch v. Lynch* (7) has, however, come to a contrary decision. There both parties were under the impression—erroneously, as the facts showed—that the previous petition had been dismissed and taken off the file. Although this case was cited in argument in the present case, nothing is said as to whether or not the distinction there drawn is justified in law.

- C AS TO EFFECT OF PETITION ON DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 658, 659, paras. 968, 969 ; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to :

- (1) *Stevenson v. Stevenson*, [1911] P. 191 ; 27 Digest 320, 2986 ; 80 L.J.P. 137 ; 105 L.T. 183.
D (2) *Kay v. Kay*, [1904] P. 382 ; 27 Digest 308, 2850 ; 73 L.J.P. 108 ; 91 L.T. 360.
(3) *Harriman v. Harriman*, [1909] P. 123 ; 27 Digest 321, 2995 ; 78 L.J.P. 62 ; 100 L.T. 557.
(4) *Lapington v. Lapington* (1888), 14 P.D. 21 ; 27 Digest 320, 2984 ; 58 L.J.P. 26 ; 59 L.T. 608.
(5) *Sandler v. Sandler*, [1934] P. 149 ; Digest Supp. ; 103 L.J.P. 88 ; 151 L.T. 313.
E (6) *Chapman v. Chapman and Thomas (Taylor intervening)*, [1938] P. 93 ; [1938] 1 All E.R. 635 ; Digest Supp. ; 107 L.J.P. 30 ; 158 L.T. 424.
(7) *Lynch v. Lynch*, [1939] 2 All E.R. 593 ; Digest Supp.
(8) *Gibbs-Smith v. Gibbs-Smith*, [1939] P. 170 ; [1939] 1 All E.R. 332 ; Digest Supp. ; 160 L.T. 364.
(9) *Johnson v. Johnson*, [1938] 3 All E.R. 765 ; Digest Supp. ; 159 L.T. 489.

- F APPEAL by the petitioner from a decision of HODSON, J., dated Jan. 18, 1939. The facts of the case are fully set out in the judgment of MACKINNON, L.J.

H. B. D. Grazebrook, K.C., for the appellant, the petitioner.

- G The respondent had not entered any appearance to the petition. *Grazebrook, K.C.* : The headnote in *Stevenson v. Stevenson* (1) says that the filing and prosecution of a suit for judicial separation prevents the period of desertion from running. These earlier petitions were filed, but never prosecuted. That distinguishes this case. If the petitioner had applied for judicial separation, which she was in a position to do, she would have got it, and would then have been entitled to a divorce by reason of the Matrimonial Causes Act, 1937, s. 6. She cannot now be in a worse position. The court must look at the intention of the parties. If the husband had made up his mind, it does not matter that there may have been a petition on the file. There is nothing in this case to show

that he ever wished to return to the petitioner. [Counsel referred to *Sandler v. Sandler* (5), *Chapman v. Chapman* (6), *Lynch v. Lynch* (7), *Gibbs-Smith v. Gibbs-Smith* (8) and *Johnson v. Johnson* (9).]

MACKINNON, L.J. : This was a petition by the wife, dated Mar. 2, 1938, on the ground that her husband had deserted her for 3 years prior to the date of the petition. The petitioner appealed against the decision of HODSON, J., dismissing the petition. A

The petition is based on an amendment of the law, made by the Matrimonial Causes Act, 1937, s. 2, which provides that the grounds of divorce in the principal Act shall include desertion without cause for a period of at least 3 years immediately preceding the presentation of the petition. B

That the husband had stayed away from the wife for at least 3 years before Mar. 2, 1938, and for a very much longer period, and refused to provide a matrimonial home, is almost beyond any question. In an interval of the period, however, two incidents occurred. First, the wife petitioned for a dissolution of the marriage on the ground of adultery, on Mar. 21, 1930. The petition remained on the file until it was dismissed on May 14, 1937, on her application, because she had not the means and could not find the co-respondent. A later petition was presented by the petitioner on May 25, 1937, again asking for a dissolution of her marriage on the ground of adultery. That petition remained on the file until it was dismissed on her application on Mar. 1, 1938, in order to make way for the present petition. It was in those circumstances that HODSON, J., intimated that he felt great difficulty in granting the relief asked for by the petitioner, in view of the existence in the books of *Stevenson v. Stevenson* (1), a case decided by this court. That, of course, was a case where the desertion had to be for at least 2 years (which at that time was a necessary accompaniment of the husband's adultery) in order to give the petitioner, the wife, a ground for divorce. In that case, there had not been desertion for 2 years, but for 18 months only, as there was a petition of the wife's (for judicial separation) on the file, and that was the reason why BARGRAVE DEANE, J., dismissed the petition, on the ground that the previous petition prevented the absence of the husband from being a desertion without cause. In dealing with that decision of BARGRAVE DEANE, J., SIR H. H. COZENS-HARDY, M.R., said, at p. 194 : C D E F G

In my opinion, this decision was perfectly right. At the date of the petition there had not been desertion for 2 years, such as is required by the statute. The desertion had lasted 18 months only. The presentation of the petition and its continuance on the files of the court prevented the subsequent desertion from being without excuse. She was praying the court to require her husband to keep away. When the supplemental petition was filed there had not been desertion for 2 years without excuse. BARGRAVE DEANE, J.'s, judgment seems to me to be in strict accordance with the very careful judgment of GORELL BARNES, J., in *Kay v. Kay* (2) and with the judgment of the full Court of Appeal in *Harriman v. Harriman* (3). BUTT, J.'s, decision in *Lapington v. Lapington* (4) is also a direct authority against the petitioner. H

Having regard to the terms of that judgment in the Court of Appeal, HODSON, J., said that he could not in this case find that for 3 years before Mar. 2, 1938, there had been desertion by the husband without excuse, and therefore he dismissed the petition. Counsel for the petitioner now asks us to reverse that decision upon the ground that the principle laid down in *Stevenson v. Stevenson* (1) was not the right one, or, alternatively that this case could be differentiated from *Stevenson v. Stevenson* (1). I am quite unable to see any difference. If *Stevenson v. Stevenson* (1) has been wrongly decided, obviously it cannot be overruled by us. That must be done by the House of Lords. It seems to me, that that is conclusive of the point in this case, and we must follow that decision in this court. In these circumstances, I think that the appeal should be dismissed. In view of the novel position as regards the point as to effective desertion under the Matrimonial Causes Act, 1937, I think that we should give leave, if so desired, to appeal to the House of Lords.

LUXMOORE, L.J. : I agree. There is, I think, no special ground in this case upon which *Stevenson v. Stevenson* (1) can be differentiated, and I think, therefore, that we are bound by that case. I agree that leave to appeal should be given.

MACNAGHTEN J. : I also agree.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors : *Percy Bono & Griffith* (for the appellant).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

Re WARREN, PUBLIC TRUSTEE v. FLETCHER AND OTHERS.

F [CHANCERY DIVISION (Simonds, J.), April 26, 1939.]

Trusts—Investments—Direction in will to invest in specified securities—Whether statutory power available to trustee—Trustee Act, 1893 (c. 53), s. 1—Trustee Act, 1925 (c. 19), ss. 1 (1), 69 (2).

The testator, who died in 1880, by his will directed his trustees to invest his residuary estate in certain investments therein specified. At the date of the summons herein, a trust fund, part of the residuary estate, was invested in trustee investments, but no part of the fund was invested in any of the investments specified in the will. The question was asked whether the trustee could invest in any investments other than those specified in the will :—

HELD : as there was no prohibition against investing in investments authorised by the Trustee Act, 1925, s. 1, the trustee had power to invest in investments authorised by that section.

[EDITORIAL NOTE. The draftsman of the Trustee Act, 1925, has adopted the device of putting into sect. 69 (2) of that Act a general provision applicable to all powers conferred by that Act. This has enabled him to omit certain words from various other sections of that Act, and in some cases sections which had appeared in previous Acts appear in the 1925 Act with certain words omitted, those words being words

to the same effect as those contained in sect. 69. The particular case here dealt with is that of the sections in the 1893 Act and the 1925 Act empowering trustees to invest in certain authorised investments. Sect. 1 of the 1893 Act contained the words: "unless expressly forbidden by the instrument (if any) creating the trust." Sect. 1 of the 1925 Act omits these words, no doubt relying upon sect. 69 (2) to qualify the section in the same way as the omitted words qualified the section of the 1893 Act. The words of sect. 69 (2), however, being intended to qualify not only sect. 1 of the 1925 Act but many others as well, are not the same as the words in sect. 1 of the 1893 Act which have been omitted from the 1925 Act. The question therefore arises whether these matters have the effect of altering the law from what it was before 1926. Basing his judgment upon the fact that the 1925 Act was largely a consolidating Act, the judge has here found that there was no intention to change the law.

AS TO INVESTMENT OF TRUST FUNDS, see HALSBURY, 1st Edn., Vol. 28, Trusts, pp. 129-135, paras. 273-278; and FOR CASES, see DIGEST, Vol. 43, pp. 926-930, Nos. 3640-3682.]

Cases referred to:

- (1) *Re Turner's Will Trusts, District Bank, Ltd. v. Turner*, [1937] Ch. 15; [1936] 2 All E.R. 1435; Digest Supp.; 106 L.J.Ch. 58; 155 L.T. 266.
- (2) *Re Outhwaite. Outhwaite v. Taylor*, [1891] 3 Ch. 494; 43 Digest 918, 3585; 60 L.J.Ch. 854; 65 L.T. 144.
- (3) *Re Burke, Burke v. Burke*, [1908] 2 Ch. 248; 43 Digest 933, 3710; 77 L.J.Ch. 597; 99 L.T. 86.
- (4) *Re Maire, Maire v. De La Batut* (1905), 49 Sol. Jo. 383; 43 Digest 933, 3709.

ADJOURNED SUMMONS by the trustee under the testator's will to determine whether the express direction to invest in a specified manner contained in the will constituted the expression of a contrary intention within the meaning of the Trustee Act, 1925, s. 69 (2).

Hubert Rose, for the plaintiff, referred to *Re Turner's Will Trusts, District Bank, Ltd. v. Turner* (1), *Re Outhwaite, Outhwaite v. Taylor* (2), *Re Burke, Burke v. Burke* (3) and *Re Maire, Maire v. De La Batut* (4).

Wilfrid M. Hunt for the first three defendants, three of the beneficiaries
T. Cunliffe for the fourth defendant, the remaining beneficiary.

SIMONDS, J.: In this case, the testator made his will on June 9, 1880, and died on Oct. 10, 1880. The Public Trustee, who is the present trustee of the will, desires directions as to the investment of a fund of £35,500 which was directed to be set aside and appropriated. By his will the testator gave his residuary estate unto the trustees of his will upon trust that they should get in the residuary personal estate and

sell dispose of and convert into money all such parts thereof as shall not consist of money or of some or one of the stocks funds or securities in or upon which investments are hereinafter authorised to be made and which they he or she shall think proper to retain . . .

The will then provides for the payment of debts and funeral and testamentary expenses, and then there follows the following investment clause:

. . . shall lay out and invest the then residue of the moneys aforesaid or so much and such part thereof as shall not have become absolutely vested in any of my

sons under the trusts hereinafter declared in the names or name of my said trustees or trustee in or upon the Government bonds or other securities of the United States of America or the bonds of the State of Massachusetts or of the City of Boston or upon the bonds of any of the following railway companies viz. the Boston and Albany the Boston and Maine the Boston and Lowell and the Boston and Fitchburg or upon mortgage of property in the City of Boston or upon the bonds of such other first-class railway companies as my said trustees or trustee may select with power from time to time to vary such investments and also the investment of any stocks funds shares or securities which shall belong to me at my decease and be retained unconverted for others of the same or the like nature as they he or she shall think proper and expedient.

A The testator then declared that his trustees should, at the expiration of 12 months from his decease, raise or appropriate and set apart the sum of £50,000, and settle that sum upon his eldest daughter. The testator then further declared that, at the expiration of 12 months from his decease, his trustees should:

C . . . raise or appropriate or set apart from and out of the stocks funds shares and securities to arise from the investment hereinbefore directed or which shall belong to me at my decease and be retained unconverted the further sum of £35,500 sterling . . . or stocks funds shares or securities which on the day of the appropriation thereof shall be equal in amount or value to the sum of £35,500 sterling And shall stand possessed of the said sum of £35,500 or of the stocks funds shares or securities so to be appropriated as last aforesaid upon the trusts hereinafter mentioned that is to say upon trust either to invest the said sum of £35,500 or to continue the same invested in or upon some or one of the stocks funds or securities in or upon which investments are hereinbefore authorised to be made with power D from time to time to vary such investments for others of the same or the like nature as my said trustees or trustee shall think proper or expedient . . .

E The beneficial interests in respect of the sum of £35,500 were then declared, being in favour of the testator's second daughter and her children. There followed a power to postpone the conversion and to retain the investments existing at the date of the testator's death. By a deed dated Aug. 26, 1938, the Public Trustee was appointed a trustee of the testator's will, so far as regarded the trust legacy of £35,500. A schedule to that deed set out a list of the investments in which the fund was invested at that date. The list did not include any invest- F ments authorised by the testator's will, nor were the investments such as the testator could have held at the date of his death, since they were all stocks which had been created or first issued at a date subsequent to the testator's death.

G The question now raised is whether the direction contained in the will for investment in or upon the bonds or other securities therein specified constitutes the expression of a contrary intention within the meaning of the Trustee Act, 1925, s. 69 (2), so that the Public Trustee would not be at liberty to exercise the powers of investment and varying investments given by the Trustee Act, 1925, s. 1. The question is H therefore, whether, under the will and the 1925 Act, the Public Trustee is confined to the power to invest contained in the will, or whether he has the further powers given by the 1925 Act. The question would be free from doubt if the matter fell to be decided under the Trustee Act, 1893, s. 1, which provided as follows :

A trustee may, unless expressly forbidden by the instrument (if any) creating

the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following . . .

Under that section, there was a power to invest in the authorised investments unless there was an express prohibition. The mere provision in the will for investment in a list of specified investments, with no negative provision, did not amount to an express prohibition. For **A** some reason, the Trustee Act, 1925, s. 1, departs in its language from the Trustee Act, 1893, s. 1, since the 1925 Act provides as follows :

(1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following . . .

The gap in the Trustee Act, 1925, s. 1, is made good by sect. 69 (2) of **B** that Act, which provides as follows :

The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument. **C**

Thus, the reference to an express prohibition has gone, and in its place the exception now is : " unless a contrary intention is expressed in the will." The 1925 Act was intended to be a consolidating Act, and, though it contains some new provisions, it would be strange if there were very serious departure from the 1893 Act (*Re Turner's Will Trusts, District Bank, Ltd. v. Turner* (1)). The principle that a consolidating Act is not intended to alter the law is applicable here. It is inconceivable that the legislature intended to depart, as to investment, from the position under the 1893 Act. I am therefore bound to give to the words " contrary intention " in the Trustee Act, 1925, s. 69 (2), the same force **E** as that given to the words " unless expressly forbidden " contained in the 1893 Act. Accordingly, I have here a direction that the trustee shall invest in certain specified investments, but no prohibition against other investments, and I have to construe these with the provisions of the Trustee Act, 1925, s. 1. It follows, in my judgment, that the Public **F** Trustee has power to invest the fund in any of the investments authorised by the 1925 Act.

A further point arises as to whether the direction in the will to appropriate certain investments to the fund alters the position, and *Re Outhwaite, Outhwaite v. Taylor* (2) is cited on this point. I cannot **G** assent to the doubt expressed by KEKEWICH, J., in that case, as to whether, where investments have been appropriated to an annuity fund pursuant to a direction in a will, it is competent to the trustees to sell those investments and invest the proceeds in trustee investments. I feel further doubt as to whether the decision itself was justified, but, **H** however that doubt may be resolved, there is a distinction between the case of an annuity fund and that of a fund for a settled legacy. If the decision is binding, I regard it as binding only on the appropriation of a fund for an annuity, which is not the case here. I accordingly answer the question on construction of the will and the investment clause

in it by saying that the direction in the will does not constitute the expression of a contrary intention. Accordingly, the Public Trustee is at liberty to exercise the powers of investment and varying investments conferred on trustees by the 1925 Act.

A Solicitors: *Thompson, Quarrell & Co.* (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *Laces & Co.*, Liverpool (for the first three defendants); *J. & P. J. F. Chapman-Walker* (for the fourth defendant).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

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WHEELER-CHERRY v. WHEELER-CHERRY.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Macnaghten, J.),
April 28, May 1, 1939.]

C *Divorce—Practice—Particulars—Allegations of adultery, birth of a child, and payments by co-respondent—Petitioner unable to give precise dates—Application for co-respondent to be dismissed from suit—Principles upon which court will act—R.S.C., Ord. 25, r. 4—Matrimonial Causes Rules, 1937, r. 81.*

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The petitioner alleged that the co-respondent had taken the respondent for motorcar drives in the course of one or more of which adultery had taken place, that the respondent had given birth to a child the paternity of which was in issue, and that the co-respondent had paid money for the support of this child. He was unable to give the precise dates when the alleged adultery took place, or the precise dates of any payments. Application was made that the co-respondent should be dismissed from the suit, on the ground that the petition and the particulars disclosed no cause of action against him:—

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HELD: the allegations made would, if proved, establish a reasonable cause of action, and the order which was sought ought not to be made.

[EDITORIAL NOTE. In many ways, the practice of the Divorce Court is subject to its own special rules, but the present matter, in which it was alleged that the statement of claim disclosed no reasonable cause of action, fell to be decided under R.S.C., Ord. 25, r. 4, and upon the usual principles applied in similar cases in other divisions of the High Court. Although it seemed very doubtful whether the appellant could, in the circumstances, establish sufficient facts to obtain any relief against the co-respondent, the court felt that it was not a case in which he had failed to disclose a reasonable cause of action, and the case could not, therefore, be stopped *in limine* by striking out the pleading.]

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AS TO PARTICULARS IN DIVORCE PETITIONS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 709, 710, paras. 1067-1070; and FOR CASES, see DIGEST, Vol. 27, pp. 399-401, Nos. 3956-3996.]

Cases referred to:

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- (1) *Hubbuck & Sons v. Wilkinson, Heywood & Clark*, [1899] 1 Q.B. 86; 32 Digest 209, 2599; 68 L.J.Q.B. 34; 79 L.T. 429.
- (2) *Goodson v. Grierson*, [1908] 1 K.B. 761; 12 Digest 194, 1534; 77 L.J.K.B. 507 98 L.T. 740.
- (3) *Laurance v. Norreys (Lord)* (1890), 15 App. Cas. 210; 32 Digest 529, 1836 59 L.J.Ch. 681; 62 L.T. 706.
- (4) *B. v. B. and G.*, [1937] P. 1; [1936] 2 All E.R. 1254; Digest Supp.; 105 L.J.P. 90; 155 L.T. 322.

APPEAL from an order of LANGTON, J., dated Feb. 27, 1939, dismissing an appeal from the order of the registrar that the co-respondent be dismissed from the suit on the ground that the petition and the particulars given thereunder disclosed no cause of action against him. The facts of the case are fully set out in the judgment of MACKINNON, L.J.

Anthony Marlowe for the appellant, the petitioner. A

S. E. Karminski for the respondent, the co-respondent.

Marlowe : The amounts of the payments, and the dates when they were made, must be irrelevant. The act itself is the material fact, not the amount, and the act is strong evidence against the co-respondent. The position here is analogous to that where an application is made to strike out a statement of claim. It is not right to ask at this stage whether there is any cause of action. Before striking out a statement of claim, every opportunity is given to a plaintiff to put it right. By the Judicature Act, 1925, s. 177, there is a statutory duty upon the petitioner in a divorce suit to name the co-respondent. By sect. 179 the court is given power to dismiss a co-respondent from a suit after the petitioner has closed his case. The implication is that it cannot be done before that time. The petition and the particulars given do disclose a cause of action, and this order should not have been made. It has the effect, not only of striking out a statement of claim, but also of disposing entirely of the action as between these two parties. It is a procedure which is only appropriate in cases which are plain and obvious : *Hubbuck & Sons v. Wilkinson*, *Heywood & Clark* (1). [Counsel referred to *Goodson v. Grierson* (2) and *Laurance v. Norreys* (Lord) (3).] B C D

Karminski : One test is whether or not, if the facts alleged here in the petition and particulars were proved in an undefended case, the petitioner could succeed. Here he could not. In *B. v. B. and G.* (4), the respondent relied upon an admission of adultery which was contained in the prayer for discretion, and which she was unable to particularise at all, and that was not allowed. There is no direct evidence here. It is purely a case of inference. Even if the facts were proved, no judge or jury could infer adultery from them. E F

Marlowe was not called on in reply.

MACKINNON, L.J. : This is an appeal from an order of LANGTON, J., dismissing an appeal from an order of the registrar that the co-respondent be dismissed from the suit on the ground that the petition and the particulars given thereunder disclosed no cause of action against him. I should have some hesitation in interfering with the decision of the judge if this were a matter dependent upon the particular rules of the Divorce Court. As far as I understand it, however, it is not. There are certain rules with regard to the conduct of divorce business, but I am informed that they conclude with a provision that, as to matters not specially dealt with by those rules, the Rules of the Supreme Court shall apply, with the necessary modifications. As I gather, this order G H

has been made pursuant to R.S.C., Ord. 25, r. 4, which provides as follows :

The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action. . . .

A In this case, the allegation in the petition is merely that the respondent has committed adultery with the co-respondent. Particulars were asked for, and, after various attempts to give them, the substance of the petition came to be that the co-respondent took the respondent for motor drives in the country in July, 1935, in the neighbourhood of Rickmansworth. There is an allegation that in the course of one or more
B of those motor drives adultery took place. Secondly, there is an allegation that, after the birth of the respondent's child in Apr., 1936, the co-respondent paid money for the support of the child. Further, as to the precise dates of the alleged adultery, or as to the precise dates of the payments, the petitioner says that he is unable to give any particulars. It is in
C those circumstances that the application under R.S.C., Ord. 25, r. 4, is made. I do not think that the effect of that rule is that the court must think it likely, having regard to what the plaintiff has stated as the nature of his knowledge of the facts upon which he bases his right to relief, that he will succeed in establishing his case. The question is whether, upon the
D allegations which he has pleaded, those allegations disclose no reasonable cause of action. In this case, although one may speculate whether the petitioner is likely to be in a position to establish the facts he has pleaded so as finally to obtain the relief he seeks against the co-respondent, I think that there is no doubt that the allegations in the pleading, if proved, do
E disclose a reasonable cause of action. In those circumstances, I think that the order of the registrar, affirmed by the judge, was not properly made under R.S.C., Ord. 25, r. 4, and the appeal should be allowed.

LUXMOORE, L.J. : I agree.

F MACNAGHTEN, J. : I agree also.

Appeal allowed with costs.

Solicitors : Wallington, Fabian & Co. (for the appellant) ; Simmons & Simmons (for the respondent).

G [Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

MARKS AND ANOTHER v. WILSON-BOYD AND OTHERS.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.J.J.), April 25, May 1, 1939.]

Libel—Pleading—Justification—Particulars—Order for full particulars—When made—Charges sufficiently specific—R.S.C., Ord. 19, r. 6.

There is not an absolute rule of practice that, whenever a plea of justification is raised in the common form "that the words are true in substance and in fact," an order for full particulars of the facts and matters relied upon in support of the plea must be made. Each case

must depend on its particular facts, and, where the charges made are sufficiently specific, no general order for particulars should be made, though an order may be made for particulars of specific matters.

[EDITORIAL NOTE.] It was contended here that there was a rule of practice that, in all cases where justification was pleaded in the defence to a libel action, a general order for particulars of the facts and matters relied upon in support of the plea ought to be made. There is no such general rule, for the words complained of may be so specific in themselves that no further particulars are required. A

AS TO PARTICULARS OF A PLEA OF JUSTIFICATION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 455-457, para. 556; and FOR CASES, see DIGEST, Vol. 32, pp. 99-101, Nos. 1308-1318. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 306-308.] B

Cases referred to:

- (1) *Goldschmidt v. Constable & Co.*, [1937] 4 All E.R. 293; Digest Supp.
- (2) *Kinnell v. Walker* (1911), 27 T.L.R. 257; 32 Digest 177, 2181.
- (3) *Holdsworth, Ltd. v. Associated Newspapers, Ltd.*, [1937] 3 All E.R. 872; Digest Supp.; 157 L.T. 274.
- (4) *Bruce v. Odhams Press, Ltd.*, [1936] 1 K.B. 697; [1936] 1 All E.R. 287; Digest Supp.; 105 L.J.K.B. 318; 154 L.T. 423. C
- (5) *Hewson v. Cleve*, [1904] 2 I.R. 536.

APPEAL by the defendants in an action for damages for libel from an order of HALLETT, J., dated Apr. 4, 1939, dismissing an appeal from an order of Master BALL ordering the defendants to give full particulars of the facts and matters relied upon in support of their plea of justification. The alleged libel was contained in lengthy letters and forms of statutory declaration published to a large number of persons interested in the whisky trade in connection with evidence given by the plaintiffs at a public inquiry in the United States of America by the Federal Alcohol Administration of that country. This inquiry was dealing with a suggested amendment of the American government regulations concerning the blending of whisky and the description of the blended product. So far as the present proceedings are concerned, it may be stated that the plaintiff was alleged to have contended that Scotch whisky blended with Irish whisky was commonly sold in England as Scotch whisky, and that the defendants had described this statement as misleading and untrue. The defence raised in the action was that the words of which complaint was made were not defamatory, or, alternatively, that they were true in substance and in fact in their natural meaning, and that there was no such innuendo as was alleged. The plea of justification was in the usual form and was as follows: D

The words contained in each of the said statutory declarations are true in substance and in fact. E

On the plaintiffs' summons for further particulars of the pleas, the master ordered full particulars of the facts and matters relied upon in support of the plea of justification. The defendants appealed to the judge in chambers, contending that the pleas in question were sufficiently specific. On behalf of the plaintiffs, it was contended that the master's order was F

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in conformity with the longstanding practice, and should stand. The judge dismissed the appeal.

A So far as concerned this appeal, the gist of the libel was that the statements made by the plaintiff at the inquiry in the United States of America to the effect that Scotch whisky had been blended with Irish grain whisky and the blended whisky sold as Scotch whisky were untrue. Four statutory declarations, all in practically the same form, had been made for the purpose of the American inquiry, and these were pleaded as libels substantially as follows :

B In a document purporting to be a statement on oath and dated Dec. 8, 1937, the defendant falsely and maliciously wrote and published and caused to be published of the plaintiffs and each of them and of them in the way of their said business and employment the words following :

" I A.B. of ——— make oath and say as follows :

1. I am chairman of X. & Co., and my company have for ——— years carried on the business of Scotch whisky distillers and blenders.

C 2. For upwards of ——— years I have been connected with the Scotch whisky trade of X. & Co.

3. During the whole of the period referred to in the preceding paragraph, no whisky other than that distilled in Scotland has been used in the blends of Scotch whisky contained in my company's bottles which have been sold extensively to the public in the British Isles and have been shipped for consumption to all parts of the world.

D 4. My attention has been directed to the statement made at the Federal Alcohol Administration Public Hearing recently at Washington, U.S.A., that many ' quality brands ' of Scotch whisky are sold in England for home consumption and that these brands contain Irish grain whisky. I have also read with considerable astonishment the text of two affidavits read at the said hearing made by C. and D. respectively and whilst not denying that malpractices are possible and may have been unchallenged I am of the opinion that the statements made as to brands of Scotch malt and Irish grain being commonly sold throughout the British Isles as Scotch whisky are altogether untrue and constitute a libel on the general integrity of the whisky trade as conducted in Great Britain."

E The defendants appealed to the Court of Appeal.

G. O. Slade for the appellants, the first four defendants.

Hon. H. L. Parker for the appellants, the sixth, seventh and eighth defendants.

F Sir William Jowitt, K.C., and Valentine Holmes for the respondents.

Parker : It is admitted that the plaintiffs may be entitled to some further particulars, but it is impossible to deal with the matter without some indication as to what particulars are required. The order is too general to fit this case. Each case must be judged in the light of its peculiar circumstances. It is a question of the balance of convenience.

G Slade : The respondents' contention that it is the invariable practice to make an order such as was made by the master is going too far. [Counsel referred to *Goldschmidt v. Constable & Co.* (1).] To leave the order as it stands will lead to increased expense and inconvenience. H [Counsel referred to *Kinnell v. Walker* (2) and *Holdsworth, Ltd. v. Associated Newspapers, Ltd.* (3).]

Jowitt, K.C. : The plea of justification presupposes a libel. It is a specific defence, and the onus of proving the facts which support that plea is on the party who pleads such justification. The object of ordering particulars is that the plaintiffs shall know exactly the case which

they will have to meet. The defendants alone can know what they are going to try to prove, and they must set out their case in detail.

Holmes : The existing practice is invariably to make an order such as was made here. To make any other order will lead to endless difficulties and repeated applications for further particulars. [Counsel referred to *Bruce v. Odhams Press, Ltd.* (4) and *Hewson v. Cleeve* (5).]

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GODDARD, L.J. [delivering the judgment of the court] : The statement of claim in this case alleges several libels, and a variety of defences is pleaded. The plea of justification relates only to the libels alleged in paras. 6, 7, 8 and 9 of the statement of claim, all of which appear to be statements made on oath with a view to their being used in some proceedings before the Federal Alcohol Administration in the United States of America.

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It is important to notice that it is recited in the order that the defendants are only justifying the words in their ordinary and natural meaning. They are accordingly not justifying the meanings which the plaintiffs have put on the words by the innuendo pleaded. The objection which the appellants take to this order is that the statements which they have made, and which are said to be defamatory, are so specific that there is *prima facie* no need for any further particulars, and that the plaintiffs ought to show what particulars, if any, are required. On the other hand, it is contended that the order made is one sanctioned by a practice which has obtained for many years, and it is said that to allow this appeal would upset this practice and cause inconvenience.

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In the opinion of the court, there is not, nor ought there to be, an absolute rule of practice that, whenever a plea of justification is raised in the common form "that the words are true in substance and in fact," an order for particulars must be made in this general form. A plaintiff is entitled to know with certainty on what the defendant intends to rely in support of his plea. Indeed, it has been said that the justification ought to state the facts with as much particularity as an indictment. No doubt in the great majority of cases a plea in this bald form ought to be supplemented by particulars from which the plaintiff can ascertain the precise nature of the charge which it is proposed to make against him, for he needs this information in order to prepare his evidence for the trial. Each case, however, must depend on its particular facts. If the words charged as a libel are themselves so specific—that is, precise—that the plaintiff must know from them what the charge is, no further particulars are required. Counsel for the respondents agreed that, if, for instance, the libel were (to take a clear case), "The plaintiff is a thief because he stole my watch from my house last Monday," no further particulars would be required, and, if asked for, would be properly refused. On the other hand, were the charge merely, "The plaintiff is a thief," he would be entitled to the facts and matters on which the defendant intended to rely in support of his plea that the plaintiff was a thief.

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- In this case, always bearing in mind that the justification does not extend to the innuendo, in our opinion, the words, *prima facie*, are so specific that we do not think that this order ought to have been made. Take first para. 6 of the statement of claim. Mr. Boyd there says that, having read affidavits by two persons named Cowper and Barclay respectively, it is contrary to the interests of the distillers of North Ireland that North Ireland grain should be mixed with Scotch malts and falsely represented as Scotch whisky. Assuming that the plaintiffs can give evidence that the words in some way refer to them, and remembering that the innuendo is wholly disclaimed by the defendants for the purpose of their plea, what is there of which the defendants could be asked to give particulars? How can they be called on to give particulars of censurable acts by the plaintiff when they say that their words do not censure him? Then, when one considers the other three paragraphs, they all appear to us to be sufficiently specific to show the precise charge, if charge it be, which the words in their natural sense convey. It may well be that the plaintiffs may want particulars of something. For instance, in cl. 4 of the affidavit set out in para. 7, they might ask, if they require it, for the official regulations to be identified, and the particular regulations given by reference to their numbers. Possibly, too, they may be entitled to have some particulars identifying the statements said to have been made as to a bottled brand, and setting out in what respects those statements are untrue. However, that is quite different from saying that in this case the plaintiffs are entitled to so general an order as that which has been made here.
- Another difficulty that might arise under this order as it stands is whether or not Sir Alexander Walker would have, for instance, to give particulars of his statement in para. 3 that nothing but whisky distilled in Scotland has been sold by his company and that this whisky has been extensively sold in the British Isles and exported for consumption all over the world. Had the defendants justified, not only in the natural meaning of the words, but with the innuendo upon them, very different considerations would have arisen. As it is, however, we are of opinion that the words in their natural meaning are specific enough, and tell the plaintiffs exactly what case they have to meet, and, if they want any further particulars, it is for them to say what they require, and it can then be determined if they are entitled to those further particulars.

- We think it right to emphasise that we are neither laying down nor overruling any point of importance relating to practice, but are merely dealing with the facts of this particular case. However, if, as here, when application by letter was made, and the defendants refused to give particulars, on the ground that the charges were specific, it must be considered whether they are in fact sufficiently specific, and, as we think in this case that they are, the appeal must be allowed. The order of HALLETT, J., will be discharged, and the costs here and before the judge in chambers will be the defendants' in any event. The costs before the

master will be the plaintiffs' costs in any event, because it was not till the hearing of the summons that the defendants stated that they only justified without the innuendo, and this ought to have been stated in the pleading.

The respondents (the plaintiffs) applied for leave to appeal to the House of Lords. A

SCOTT, L.J. As stated in the judgment of the court, our ground is solely the peculiar character of the allegations contained in the pleadings in this case, and it has no general scope beyond what has been stated in the judgment. We do not think that any general question arises upon it, and therefore we must refuse leave to appeal. B

Solicitors: *Francis Redfern* (for the appellants, the first four defendants); *Slaughter & May* (for the appellants, the sixth, seventh and eighth defendants); *Clifford-Turner & Co.* (for the respondents). C

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

BOND v. NORMAN. BOND v. NOTTINGHAM CORPORATION. D

[CHANCERY DIVISION (Simonds, J.), April 21, May 4, 1939.]

Easements—Support—Interference—Demolition of adjoining house—Demolition in obedience to clearance order—Liability of person demolishing.

The plaintiff was entitled to an easement of support in respect of his premises from the defendant's premises, and it was agreed that, if the defendant's premises were demolished, there was a serious danger of the plaintiff's premises collapsing. The defendant was ordered, by a clearance order made by the local authority and confirmed by the Minister of Health, to demolish his premises, and he contended that, as, he would be demolishing his premises in pursuance of the order, the plaintiff would have no right of action against him in respect of the loss of support. If the defendant failed to demolish his premises, he would not be subject to any penalty, the statute providing in such case that the local authority shall enter upon the premises and demolish them :— E

HELD : although the defendant would be demolishing his premises in obedience to the clearance order, he would be bound to have the same regard to the right of support as if he were voluntarily demolishing his premises. F

[EDITORIAL NOTE. The suggestion in this case was that, since the demolition was a compulsory one under the clearance order, the defendant would not be liable for the results of such demolition. The court, however, has taken the view that, as the Act imposes no sanction or penalty upon failure to demolish, the demolition is not a compulsory one, in the sense that the person demolishing will not be responsible for the results of that act. G

AS TO INTERFERENCE WITH EASEMENT OF SUPPORT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 368, 369, paras. 647, 648 ; and FOR CASES, see DIGEST, Vol. 19, pp. 173, 174, Nos. 1230-1233.] H

Cases referred to :

- (1) *Bower v. Peate* (1876), 1 Q.B.D. 321 ; 19 Digest 173, 1231 ; 45 L.J.Q.B. 446 .
35 L.T. 321.

(2) *Jones v. Pritchard*, [1908] 1 Ch. 630; 19 Digest 43, 229; 77 L.J.Ch. 405; 98 L.T. 386.

(3) *A.-G. v. Horner* (1884), 14 Q.B.D. 245; 42 Digest 743, 1679; 54 L.J.Q.B. 227; *on appeal* (1885), 11 App. Cas. 66.

(4) *Public Works Comr. (Cape Colony) v. Logan*, [1903] A.C. 355; 42 Digest 704, 1212; 72 L.J.P.C. 91; *sub nom. Smart (Public Works Comr.) v. Logan*, 88 L.T. 779.

(5) *Geddis v. Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430; 13 Digest 399, 1223.

MOTION for an injunction to restrain the defendants from proceeding with the demolition of their premises without providing proper support for those of the plaintiff. As against the defendant Norman, the motion was treated as the trial of the action.

E. J. Rimmer for the plaintiff.

W. L. Roots for the defendant Norman.

Wilfrid M. Hunt for the defendants the Nottingham Corporation.

Rimmer: If the statutory duty is exercised, either by the defendant Norman or, in default, by the corporation in the way in which they propose to exercise it, it will cause the plaintiff damage. [Counsel referred to *A.-G. v. Horner* (3), *Public Works Comr. (Cape Colony) v. Logan* (4) and *Geddis v. Bann Reservoir (Proprietors)* (5).]

Roots: There is no real reason for the corporation being here, as the burden falls on the defendant Norman. The easement here is merely a right permitting the plaintiff to rest the wall of his house on the defendant Norman's house, and the defendant Norman is not obliged to maintain his wall. The position is much the same as it would be if the building had fallen down. The plaintiff has no absolute right to have his wall supported: *Jones v. Pritchard* (2). The obligation to continue to support does not arise if the removal of the support is effected under an order of the local authority. This building is over 100 years old, and the house which is condemned has reached the end of its life. No compensation is payable for the houses condemned, and the plaintiff is in a better position than that of the defendant Norman if he can be compensated for the loss of the right of support. As regards the reasonableness of the exercise of the statutory authority, this should be confined to the method of carrying out the statutory duty, and not to the content of the duty.

Hunt followed for the corporation.

Rimmer, in reply.

SIMONDS, J.: The plaintiff is the owner of certain premises known as Aspley House, Alperton Road, in the city of Nottingham. The defendant Norman is the owner of premises immediately adjoining Aspley House known as Aspley Place. The plaintiff alleges that he is entitled to an easement of support for his premises from the defendant's premises. This the defendant does not dispute. The evidence is uncontradicted that the wall of the plaintiff's premises, where it abuts on the defendant's

premises, is, and has been for 50 years or more, supported by those premises, and that, if they are demolished, there is the most serious danger of a collapse of the plaintiff's premises, unless some equivalent support is provided. The defendant threatens and intends so to demolish his premises unless he is restrained from so doing by this court, and seeks to justify his act by the facts which I now state. A

The defendant's premises, together with other premises in their immediate vicinity, were the subject of a clearance order made by the council of the county borough of Nottingham under the authority of the Housing Act, 1930, and confirmed by the Minister of Health by an order called the Nottingham (Aspley Place) Housing Confirmation Order, 1935. B
The effect of the order, so far as it concerned the defendant, was that he was to demolish his premises before the expiration of 6 weeks from the date on which they were vacated, or of such longer period as, in the circumstances, the council might deem reasonable. If he fails to do so, he incurs no penalty, but the council is under a duty to enter and demolish the premises, and to sell the materials thereof. C
The last occupant of the premises vacated them on Feb. 6, 1939, and it then became the duty of the defendant to demolish them. The plaintiff had good ground for thinking that he intended to do so without providing support for his building, and commenced these proceedings. Six weeks having passed D
since Feb. 6, 1939, and the defendant having failed to demolish the premises, it became the right and the duty of the Nottingham Corporation to enter and demolish them, unless the time for the defendant to do so was enlarged. The plaintiff, realising this fact, and failing to obtain any satisfactory assurance from the corporation, commenced E
an action against them, which has been by order consolidated with the action against the defendant Norman. In the consolidated action, the plaintiff now moves against both defendants. In the course of the hearing, however, it appeared that the corporation propose, as their usual practice is, to extend the time for the defendant to demolish the F
premises, and, in answer to my question, their counsel explicitly stated that they did not now threaten and intend themselves to demolish the defendant's premises. What they may do, if, within the enlarged time, the defendant does not do the work, is, of course, a matter which is at large, and I can deal with it when occasion arises. The only question G
with which I now have to deal is whether the defendant Norman can use the clearance order as an excuse for doing that which he could not otherwise do—namely, remove the support to which the plaintiff's premises are entitled without providing equivalent support. I thus state the right of the plaintiff as dominant owner, for it is clear that there is no H
interference with his right if one mode of support is substituted for another, provided the actual support is still continued: *Bower v. Peate* (1), at p. 327.

In my judgment, the defendant wholly fails to justify what he proposes to do. It is true that the obligations of the owner of a servient tenement

are negative. He is not bound to execute repairs necessary for the enjoyment of the easement by the owner of the dominant tenement. The defendant would not be liable if, by reason of natural decay or other circumstances beyond his control, his premises fell down: see *per PARKER, J.*, in *Jones v. Pritchard* (2), at p. 637. However, no authority has been cited to me which suggests that an act is any the less the voluntary act of the actor because it is done in compliance with an order of a local authority, even though that order has been reinforced by the confirmation of the Minister of Health. The quality of the act is the same, whatsoever may be the reason for doing it. Nor, in fact, is there any sort of compulsion upon Norman. The Act imposes no sanction or penalty. If he does not demolish, the worst he suffers is that the local authority does so in his place, and charges him with the cost of it. He chooses to do it himself, and, so choosing, is bound to have the same regard for the rights of his neighbours as in the performance of any other voluntary act.

Solicitors: *Peacock & Goddard*, agents for *Hunt, Dickins & Willatt*, Nottingham (for the plaintiff); *Gregory, Rowcliffe & Co.*, agents for *Johnstone, Williams & Walker*, Nottingham (for the defendant Norman); *Sharpe, Pritchard & Co.*, agents for *J. E. Richards*, Town Clerk, Nottingham (for the defendants the Nottingham Corporation).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

TRIPLEX SAFETY GLASS CO., LTD. v. LANCEGAYE SAFETY GLASS (1934), LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and du Parcq, L.JJ.)
April 19, 20, May 2, 1939.]

Discovery—Interrogatories—Privilege—Incriminating interrogatories—Libel—Undertaking not to prosecute—Right of company to assert privilege.

Libel—Criminal libel—Company—Liability to be sued or indicted.

The plaintiff company claimed damages against the defendant company and against L. for libel and slander, and sought to interrogate both defendants in order to obtain admissions (a) that they published defamatory libels, (b) that they were actuated by malice, and (c) that the defendant L., acting on his own behalf and on behalf of the defendant company, spoke and published words defamatory of the plaintiff company which had been previously published, and were subsequently repeated in the libels complained of. Both the defendants declined to answer any of the interrogatories, on the ground that the answers would tend to incriminate them. It was contended on behalf of the plaintiffs that the defendants had no reasonable ground to apprehend danger if they were compelled to answer. So far as the defendant L. was concerned, the plaintiff company was prepared to give an undertaking not to prosecute him. So far as the defendant company was concerned, it was further contended (i) that a corporation cannot be indicted for a libel, (ii) that, even supposing a company can be so indicted, that course would be improbable in the present case, and (iii) that a company is not entitled to rely upon an objection that an answer may tend to incriminate it:—

HELD: (i) it was impossible to say that the objection of L. was made *mala fide*, in that there was no possibility of a prosecution, and, as

his answer might tend to incriminate him, he was entitled to refuse to answer.

(ii) no distinction could be drawn between the case of the defendant L. and that of the defendant company, since a company can be indicted for libel.

(iii) on principle, there was no reasonable ground for saying that the claim of privilege should be limited to natural persons, and that it could not be taken advantage of by a corporation.

[EDITORIAL NOTE.] The judgment herein considers a number of matters arising upon a claim of privilege in answer to interrogatories in a libel action. The privilege claimed is that of refusing to answer on the ground that the answers tend to incriminate the person interrogated. The first matter considered is a rebuttal of the claim by showing that there is no possibility of a prosecution. On this, it is material to note that the court disregarded an undertaking offered by the plaintiffs that they would not prosecute. The next matter was whether a company is liable to a prosecution for libel. The liability of a company to civil proceedings was treated as settled by the authority of *Citizens' Life Assurance Co. v. Brown* (10), and it was said to follow from that that it is possible to prove against a company all the constituent elements of the crime of publishing a defamatory libel. Lastly, it was debated whether a company was in the same position as a natural person in claiming privilege, and on this it is held to be contrary to principle that any person, including both a natural and a juristic person, capable of committing a crime should be compelled by law to admit a criminal offence.

AS TO INTERROGATORIES IN LIBEL, see HALSBURY, Hailsham Edn., Vol. 10, pp. 416-420, paras. 509-514; and FOR CASES, see DIGEST, Vol. 18, pp. 238-241, Nos. 1813-1846.

AS TO LIABILITY OF COMPANY IN LIBEL, see HALSBURY, Hailsham Edn., Vol. 20, p. 444, para. 537; and FOR CASES, see DIGEST, Vol. 9, pp. 647, 648, Nos. 4278-4288.]

Cases referred to :

- (1) *Lamb v. Munster* (1882), 10 Q.B.D. 110; 18 Digest 241, 1842; 52 L.J.Q.B. 46; 47 L.T. 442.
- (2) *Redfern v. Redfern*, [1891] P. 139; 18 Digest 53, 99; 60 L.J.P. 9; 64 L.T. 68.
- (3) *Adams v. Lloyd* (1858), 3 H. & N. 351; 18 Digest 218, 1651; 27 L.J.Ex. 499; 31 L.T.O.S. 219.
- (4) *Re Reynolds, Ex p. Reynolds* (1882), 20 Ch.D. 294; 22 Digest 398, 4057; 51 L.J.Ch. 756; 46 L.T. 508.
- (5) *R. v. Boyes* (1861), 1 B. & S. 311; 22 Digest 398, 4056; 30 L.J.Q.B. 301; 5 L.T. 147.
- (6) *Maccallum v. Turton* (1828), 2 Y. & J. 183; 18 Digest 239, 1815.
- (7) *Short v. Mercier* (1851), 3 Mac. & G. 205; 18 Digest 182, 1337; 20 L.J.Ch. 289; 16 L.T.O.S. 453; 18 L.T.O.S. 266.
- (8) *Société Immobilière St. Honoré Monceau v. Financial General Trust, Ltd.* (1933), Unreported.
- (9) *R. v. Wicks*, [1936] 1 All E.R. 384; Digest Supp.; 154 L.T. 471.
- (10) *Citizens' Life Assurance Co. v. Brown*, [1904] A.C. 423; 32 Digest 82, 1130; 73 L.J.P.C. 102; 90 L.T. 739.
- (11) *Pharmaceutical Society v. London & Provincial Supply Assn.* (1880), 5 App. Cas. 857; 13 Digest 351, 891; 49 L.J.Q.B. 736; 43 L.T. 389; affg. 5 Q.B.D. 310.
- (12) *Webster v. Solloway Mills & Co.*, [1931] 1 D.L.R. 749; Digest Supp.
- (13) *Sitwell v. Sun Engraving Co., Ltd.*, [1937] 4 All E.R. 366; Digest Supp.; 107 L.J.Ch. 68; 158 L.T. 56.
- (14) *R. v. Cory Brothers & Co.*, [1927] 1 K.B. 810; Digest Supp.; 96 L.J.K.B. 761; 136 L.T. 735.
- (15) *Whitfield v. South Eastern Ry. Co.* (1858), E.B. & E. 115; 13 Digest 403, 1244; 27 L.J.Q.B. 229; 31 L.T.O.S. 113.

- (16) *R. v. Munslow*, [1895] 1 Q.B. 758; 32 Digest 198, 2464; 64 L.J.M.C. 138; 72 L.T. 301.
 (17) *Abrath v. North Eastern Ry. Co.* (1886), 11 App. Cas. 247; 13 Digest 403, 1248; 55 L.J.Q.B. 457; 55 L.T. 63; *affg.* (1883), 11 Q.B.D. 440.
 (18) *Wood v. Cox* (1888), 4 T.L.R. 550; 32 Digest 167, 2046.
 (19) *Davis v. Gray* (1874), 30 L.T. 418; 18 Digest 241, 1838.

A

APPEAL by the defendants from an order of GREAVES-LORD, J., dated Mar. 18, 1939, allowing an appeal from Master SIMNER. The question raised was whether or not the defendants were entitled to claim privilege in answering certain interrogatories on the ground that such interrogatories might tend to incriminate them. The matter arose out of an alleged libel contained in a circular in which were recited certain negotiations between a group of associated companies, of which the plaintiffs were one. The statement of claim alleged that the individual defendant repeated the statements at a meeting of shareholders, and also that the defendants caused what was said to be inserted in certain financial newspapers. The defendant company and the individual defendant declined to answer the interrogatories, because the answers would tend to incriminate them.

John Foster for the appellants.

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E. Holroyd Pearce for the respondents.

Foster: There is abundant authority for saying that an individual defendant is not bound to answer any interrogatories where he swears that the answers will tend to incriminate him. The main case on the point is *Lamb v. Munster* (1), which case has some bearing upon the company.

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In *Sitwell v. Sun Engraving Co., Ltd.* (13), it was held that the defendants were not entitled to call upon the plaintiff to incriminate himself in order to establish their case. All the authorities agree that discovery need not be given in libel cases if the witness claims privilege. In this connection, "probability" means that a man can refuse to answer on the ground that it would tend to incriminate him, and not on the ground that he would probably be prosecuted. A company can be prosecuted for libel. The point has come before a Canadian court. In *Webster v. Solloway Mills & Co.* (12), it was held that the production of documents tending to criminate a company or person cannot be compelled.

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It is in accordance with principle that a corporation can be prosecuted for libel. *R. v. Cory Brothers & Co.* (14) is the case which contains what is accepted as the dividing line between cases in which a company cannot be prosecuted and those in which it can. [Counsel referred to *R. v. Boyes* (5), *Pharmaceutical Society v. London & Provincial Supply Assocn.* (11) and *Whitfield v. South Eastern Ry. Co.* (15).]

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Holroyd Pearce: The defendants are not entitled to privilege on the ground that the answers would incriminate them unless they satisfy the court that there is a reasonable probability of danger to themselves. There is no reasonable probability of danger to the defendant company in respect of the libel. In the case of the slander, the case is stronger.

A company cannot be prosecuted for libel. Alternatively, there is no instance of a company having been prosecuted for libel, and it is not likely to happen in the present case. If facts are known which show quite clearly that there never would be a prosecution, the court can take those facts into account. A mere statement of belief by a person is not enough to excuse him from answering, but the court must be satisfied that there is a reasonable ground for the belief. The question is whether or not the witness would be in peril. In *R. v. Munslow* (16), it was held that the Libel Act, 1843, created no new offence. When BRAMWELL, L.J., said in *Pharmaceutical Society v. London & Provincial Supply Assn.* (11) that a company could not be prosecuted for libel, it was on the footing that the company could not be guilty of malice, but that position has gone, by reason of the decision in *Abrath v. North Eastern Ry. Co.* (17). No company appears ever to have been prosecuted for a libel, and no good result would follow from a prosecution in the present case. The claim for privilege should be limited to natural persons. All the authorities refer to the matter as though the privilege applied to individuals only. The privilege is not necessary for a corporation. [Counsel referred to *Maccallum v. Turton* (6), *Short v. Mercier* (7), *Société Immobilière Saint Honoré Monceau v. Financial General Trust, Ltd.* (8), *Re Reynolds, Ex p. Reynolds* (4) and *Wood v. Cox* (18).]

Foster, in reply : As regard the question of *bona fides* and reasonable apprehension of danger, *Maccallum v. Turton* (6) has been cited. The question in that case was whether or not the matter would tend to be a step in a criminal prosecution, and the probability considered was whether or not it would be a step which would lead to prosecution, and not whether or not the witness would be convicted. In *Short v. Mercier* (7), the point was similar to that in *Lamb v. Munster* (1), and the arguments put forward on behalf of the respondents in this case might have been used in that case. *R. v. Boyes* (5) had reference to a witness in the box. The witness was not a party in the case, and the court had to consider the question of *bona fides*, because no criminal offence was alleged against him. It has never been possible, in the present case, for anyone to say that the defendant company was not taking a proper and *bona fide* attitude. The *bona fides* is shown by the fact that a criminal offence is alleged. *Re Reynolds, Ex p. Reynolds* (4) was also the case of a witness. A company should be protected by privilege in cases which might be serious, and the decision in *Webster v. Solloway Mills & Co.* (12), is consistent with principle. The appeal should be allowed and the order quashed. [Counsel referred to *Davis v. Gray* (19).]

DU PARCQ, L.J. [delivering the judgment of the court]: The plaintiff company claims damages against the defendant company and the defendant Liverman for libel and slander, and seeks to interrogate both defendants in order to obtain admissions (a) that

they published defamatory libels, (b) that they were actuated by malice, and (c) that the defendant Liverman, "acting on his behalf and on behalf of the defendant company," spoke and published words defamatory of the plaintiff company which had been previously published, and were subsequently repeated in the libels complained of. The

- A defendant Liverman has declined to answer any of the interrogatories, taking the objection on oath that to the best of his knowledge, information and belief the answers would tend to incriminate him. A similar objection was taken by the secretary of the defendant company on its behalf. GREAVES-LORD, J., reversing the decision of the master, has held
- B that the defendants are bound to answer the interrogatories, notwithstanding their objection.

- The law is well settled. It is a general rule that "no one is bound to criminate himself," in the sense that he is not to be compelled to say anything which "may tend to bring him into the peril and possibility
- C of being convicted as a criminal," as was said by FIELD, J., in *Lamb v. Munster* (1), at p. 111. We are here concerned with the rule in its relation to discovery, which BOWEN, L.J., stated as follows in *Redfern v. Redfern* (2), at p. 147 :

- It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure.
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To the rule so stated there is no real exception, so far at least as discovery is concerned, and it is the paramount duty of the court to uphold it. The court has, none the less, a duty to make sure, so far as may be, that the protection of the rule is not accorded to persons who have in truth no claim to it. To this end, certain principles have in course of time been established which may be stated shortly as follows. (i) The mere fact that a party or a witness swears that his answer would tend to criminate him is not conclusive. The court may have a duty, notwithstanding this assertion of a claim to privilege, to compel him to answer. (ii) The court will insist upon an answer if, in the words of

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F POLLOCK, C.B., in *Adams v. Lloyd* (3), at p. 362 :

... the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege ...

- G As appears from the judgment of POLLOCK, C.B., in that case, it was at one time thought, at any rate by some judges, that it was only in such a case (where the objection is plainly made *mala fide*) that the court should refuse to accept a witness's objection as conclusive. (iii) Since the decision of the Court of Appeal in *Re Reynolds, Ex p. Reynolds* (4),
- H approving the decision of the Court of Queen's Bench in *R. v. Boyes* (5), it has not been in doubt that the power of the court to insist on an answer is not limited to a case of *mala fides*. As was said in *R. v. Boyes* (5), at p. 330, it extends to any case in which it is not made to appear to the court :

... that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.

It was contended on behalf of the plaintiffs that there was here no reasonable ground to apprehend danger to the parties interrogated. Part of the argument was addressed only to the case of the defendant company, and we will deal with this later. So far as the defendant Liverman was concerned, it was said that it was highly improbable that he would be prosecuted on a charge of criminal libel, and that, so far as the plaintiff company could ensure his immunity from such a prosecution, it was prepared to do so by giving any undertaking which might be required. It was said further that the libel, though grave, was not so serious as to justify a prosecution, and that so long a time had passed since the publication of the libel that no one was likely to be bold enough to found an indictment on so stale a charge. In our view, this contention is based on a misunderstanding of the authorities. The "danger" of the existence of which the court must be satisfied is, to quote again the words of FIELD, J., in *Lamb v. Munster* (1), at p. 111 :

" . . . the peril and possibility of being convicted as a criminal."

In *R. v. Boyes* (5), it was held that no such danger existed, because the witness had been pardoned by the Crown for the part which he had taken in the transaction alleged to be criminal. He professed to fear, notwithstanding the pardon, that he might be impeached by the House of Commons, a supposition which the court held to be "simply ridiculous." The principle there laid down, at p. 330, was :

. . . that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice.

That is the only case to which our attention was directed in which a witness was compelled to admit in terms the commission of a criminal offence, and the ground of the decision was that "in the ordinary course of the law" it had become not merely improbable, but impossible, that the witness should ever be convicted of that offence. It does not seem ever to have been held that a man may be compelled to answer a question directed to procuring his confession of a criminal act merely on the ground that, in the particular circumstances of the case, and on a balance of probabilities, it is unlikely that he will be prosecuted. Cases may, of course, arise in which the court is satisfied that no reasonable man could possibly be apprehensive of a prosecution—as, for instance, where the offence is trivial, or was committed many years ago—and then it may be that the judge, even if he were not prepared to go to the length of imputing *mala fides* to the witness, might insist upon an answer. Much must be left to the discretion of the judge, who will not usually be likely to take this course unless he thinks that there is good reason to doubt the witness's good faith. As a general rule, it is true to say that any admission of a criminal offence, of which the witness has not hitherto been convicted, must tend to criminate him within the meaning of the rule.

There is, we believe, nothing in any of the cases cited to us inconsistent with the view which we have expressed. In *Re Reynolds, Ex p. Reynolds* (4), a witness in the Bankruptcy Court was being asked a question which, on the face of it, had no tendency to criminate him, and there was nothing to suggest that his answer could possibly form “a link in a chain” of evidence against him. The court was satisfied, in the words of COTTON, L.J., at p. 302 :

... that there was some other reason for his saying “You will get nothing out of me.”

Counsel for the respondents placed some reliance on the early case of *Maccallum v. Turton* (6), in which ALEXANDER, C.B., delivering the judgment of the Court of Exchequer, said that a witness would not be compelled to answer if there were “a reasonable probability” that he might be indicted for a fraud imputed to him. A close examination of that case shows, however, that the real question at issue there was whether, assuming the required admissions to be made, there would be a ground in law for a criminal prosecution. This raised a question of law which was not free from doubt, and the “probability” with which the court was concerned was the probability that, in the uncertain state of the law, the witness might be indicted, and, perhaps, convicted. Similarly, in *Short v. Mercier* (7), although an exceptionally cautious head-note at first sight affords some support to the respondents’ contentions, it is plain on examination that LORD TRURO, in a case where the metaphor of “links in a chain” was again applied, did not feel justified in insisting upon an answer to interrogatories from parties who had stated circumstances which “rendered it possible” that they might be brought into the peril which they professed to apprehend.

Counsel for the respondents very properly drew our attention to *Société Immobilière St. Honoré Monceau v. Financial General Trust, Ltd.* (8), in which the Court of Appeal (SCRUTTON, GREER, and SLESSER, L.JJ.) ordered the defendant company to answer interrogatories notwithstanding an objection similar to that taken in this case. In that case, there was an allegation of conspiracy. The facts are not fully stated in the judgments, but it would appear that the acts relied on to prove a conspiracy had (with one possible exception) all been performed outside the jurisdiction of the English courts, and in a country where no criminal proceedings would lie in respect of the offences alleged. In all the circumstances, the court was not satisfied that the objection was taken *bona fide*. Both SCRUTTON and SLESSER, L.JJ., rested their judgments on the ground of *mala fides*. We were much pressed with certain passages in the judgment of GREER, L.J., notably these words :

The question is, taking all together the circumstances in this case and the oath that has been sworn, is there any reasonable ground to apprehend danger to the defendant company of having to suffer prosecution ?

We think, however, that, when the judgment of GREER, L.J., is read as a whole, it is plain that he was at one with the other members of the

court in deciding the case on the ground that the objection was not made *bona fide*, and that he was considering all the circumstances, including the probability of a prosecution, in order to come to a conclusion as to the true state of mind of the defendants.

Applying the law as we have stated it to the present case, we come to the conclusion (i) that it is impossible to say that the defendant Liverman's objection is made *mala fide*, and (ii) that his answer to the interrogatories might "tend to criminate him." There is no doubt that he might be prosecuted, and it is at least possible that he might be convicted, on an indictment charging him with criminal libel if the allegations in the statement of claim were proved against him : *R. v. Wicks* (9). An undertaking not to prosecute can have no binding effect, and at least two persons who might be minded to prosecute have not expressed any intention to refrain from doing so. It would be difficult to accede to the argument of counsel for the respondents without going the length of saying that the court might always compel a witness to incriminate himself if the judge thought that those persons who might be expected to prosecute were likely to be soft-hearted, or a jury to be indulgent. We should add that the date of the alleged libels, which were published in 1938, is, in our opinion, by no means so remote as to make it unreasonable to suppose that a prosecution might now be founded upon them.

In the circumstances of this case, no distinction can be drawn between the interrogatories relating directly to the libels alleged and those which refer to an alleged slander. Generally speaking, it is, of course, true to say that a man does not incriminate himself by confessing that he has spoken defamatory words unless they are blasphemous, seditious, or obscene. In the present case, however, the defendant Liverman is alleged to have adopted as his own, and to have repeated, the language of a circular letter which purports to bear his signature, and which is one of the libels of which complaint is made. It is manifest, therefore, that an admission of the slander would be no less effective to criminate him than an admission of the libel itself.

With regard to the defendant company, it was further contended (i) that a corporation cannot be indicted for a libel, (ii) that, even supposing a company may be so indicted, it is in a high degree improbable that the experiment of such a prosecution, hitherto untried, will be made on the defendant company, and (iii) that in any event a company (as distinguished from a natural person) is not entitled to rely on an objection that an answer may tend to incriminate it. In our view, these contentions fail, and no distinction can be drawn between the case of the company and that of the defendant Liverman. As to the first, it is not in doubt that a limited company is responsible, in a civil action, for a libel published by one of its officers, and that it is capable of malice : *Citizens' Life Assurance Co. v. Brown* (10). It follows that it is possible to prove against a limited company all the constituent elements of the

crime of publishing a defamatory libel: *R. v. Wicks* (9). It seems to us, therefore, to be in accordance with principle to hold that a limited company may be indicted for libel, and this view has the strong support of the well-known *dictum* of LORD BLACKBURN in *Pharmaceutical Society v. London & Provincial Supply Asscn.* (11), at pp. 869, 870. As to the
 A second point, we must, for reasons sufficiently stated in relation to Liverman, refuse to enter upon an inquiry as to the chances of a prosecution being instituted, or as to its success.

Finally, we agree with the opinion of the Supreme Court of Alberta in *Webster v. Solloway Mills & Co.* (12), at pp. 833, 834, to which our
 B attention was drawn, that on principle one cannot see any reasonable ground for the support of the view that this claim of privilege should be limited to natural persons and that it could not be taken advantage of by a corporation.

It is true that a company cannot suffer all the pains to which a real
 C person is subject. It can, however, in certain cases, be convicted and punished, with grave consequences to its reputation and to its members, and we can see no ground for depriving a juristic person of those safeguards which the law of England accords even to the least deserving of natural persons. It would not be in accordance with principle that
 D any person capable of committing, and incurring the penalties of, a crime should be compelled by process of law to admit a criminal offence. For these reasons, we have come to the conclusion that the order of the judge should be set aside and the decision of the master, who refused to order further and better answers, restored. The master's order as to costs is
 E to stand. The costs both here and before the judge are to be paid by the plaintiff company in any event.

Solicitors: *Last, Riches & Fitton* (for the appellants); *Bird & Bird* (for the respondents).

F [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

EAST BARNET URBAN DISTRICT COUNCIL v. STACEY AND OTHERS.

G [KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Lewis, JJ.), May 1, 1939.]

Highways—Streets—Making up—Provisional apportionment of cost—Providing new gullies and altering existing gullies—Whether part of drainage system or of formation of road—Whether chargeable to frontagers or to ratepayers—Private Street Works Act, 1892 (c. 57), s. 5.

H The appellants, as the urban authority under the Private Street Works Act, 1892, passed a resolution in June, 1937, approving the plans and estimates for making up certain streets. The streets and the carriageways and levels thereof, with gullies and connections, were laid out by the estate developer after a plan thereof had been approved by the appellants as complying with the provisions of the bye-laws then in force as to the widths of streets and carriageways. Such work was carried

out in or about 1929, and the carriageways and levels thereof, with gullies and connections, had been so maintained in use ever since. The respondents, as the owners of premises adjoining or abutting upon portions of the streets, which premises were included in the provisional apportionments of the cost of the proposed work, objected to the provisional apportionments on the ground, *inter alia*, that the cost of providing new gullies or altering the position of existing gullies and altering levels in the streets should not be charged to the frontagers, but should be charged to the ratepayers of the district, as the gullies and connecting pipes were, and always had been, part of the drainage system, and formed no part of the carriageways of the streets:—

HELD : as gullies were part of the drainage system, and not part of the formation of the road, the cost of the provision of new gullies and the alterations to existing gullies could not be charged upon the frontagers, but should be deleted from the provisional apportionments.

[EDITORIAL NOTE.] The provisions for charging the cost of making up streets upon the frontagers have been often considered, but in this case a fresh point is raised—namely, whether these charges can include the subterranean part of the drainage system of the streets. It is held that the only charges which can be apportioned are the cost of the surface work upon the street, and that the cost of the connection of the gullies to the sewer must be borne by the local authority.

AS TO APPORTIONMENT OF EXPENSES UNDER PRIVATE STREET WORKS ACT, 1892, see HALSBURY, *Hailsham Edn.*, Vol. 16, pp. 453, 454, paras. 658, 659; and FOR CASES, see DIGEST, Vol. 26, p. 489, Nos. 2001-2003.]

Case referred to :

- (1) *Wandsworth Borough Council v. Golds*, [1911] 1 K.B. 60; 26 Digest 489, 2001; 80 L.J.K.B. 126; 103 L.T. 568.

APPEAL by way of case stated from a decision of justices for the county of Hertford sitting at Barnet. The facts and the arguments are set out in the judgment of LORD HEWART, L.C.J.

Erskine Simes for the appellants.

Robert Fortune for the respondents.

LORD HEWART, L.C.J. : The real question which is at issue in this case seems to me to be capable of brief statement. The case finds that an objection was made by certain owners of premises to a proposal made by the East Barnet Urban District Council to level, pave, metal, flag, channel, make good and do other work to certain streets. On the hearing of the objection, various facts very carefully set out in the case were admitted or proved. In particular, it is found as a fact that the respondents duly objected to the provisional apportionments on the ground that the cost of providing new gullies or altering the position of existing gullies and alterations of levels in the streets should not be charged to the frontagers, but should be charged to the ratepayers of the district. The case further finds that those streets and the carriage-ways and levels were laid out by the estate developer after the plan had been approved by the appellants—that is to say, the local authority—and that such work was carried out in or about 1929, and the carriage-ways and the levels and gullies were connected and have been maintained

in use ever since. I think that the fairest thing will be to read three paragraphs of the findings of fact :

A 12. The cost of the private street works (including the alteration of gullies and connections) to be executed in each of the streets referred to [in certain sub-paragraphs] is less than the cost which would have been incurred in executing private street works in respect of each of the said streets respectively with a carriage and footways of the width prescribed by the bye-laws which applied to each of the said streets respectively at the time at which each of the said streets respectively was laid out.

B 13. In the above three streets referred to in subparas. (10) and (11) of this paragraph where the carriageway is to be altered in width, certain gullies with connections therefrom to the surface water sewer were provided by the estate developer when the road was constructed. These gullies are situate at points on the edge of the carriageway as laid out. If and when the width of the carriageway is reduced, these gullies will be situate in the footpaths, and if and when the said width is increased, the said gullies will be separated from the channels by a strip of the carriageway and it is necessary that they should be realigned to the new channels, and that pipes connecting the said realigned gullies to the existing connections with the surface water sewers in the said streets should be laid.

C 14. In certain parts of all the streets the levels require to be corrected and the positions of the existing gullies require to be adjusted to conform to the new levels.

The case further finds that the existing gullies are insufficient in number, and require to be supplemented by additional gullies and connections in certain streets which are specified, and that certain of the existing gullies are unsuitably sited for the purpose of efficient road drainage, and require D to be resited and reconnected in certain streets which are again named.

E Upon the facts proved or admitted, it is contended on behalf of the appellants—that is to say, the urban district council—that, as regards the provision of new and additional gullies in the carriageways of certain streets, the appellants are entitled to require the same as part of the private street works which the appellants are empowered to carry out under the Private Street Works Act, 1892, and they contend accordingly that the whole cost of the provision of new gullies and the alteration of existing gullies should as a matter of law be included in the apportionments and borne by the frontagers.

F On the other hand, it is contended on behalf of the respondents that the gullies and connecting pipes are, and have always been, part of the drainage system, and form no part of the carriageways of the streets, and that by the approval of the plan and the acceptance of the gullies and connections and levels the appellants have precluded themselves G from proceeding against the frontagers for the cost of the improved or new gullies and connection pipes, or alterations to the existing gullies and levels.

H The justices came to the conclusion that the respondents' contention was correct, and, accordingly, that the cost of the provision of new gullies and the alterations to the existing gullies should not be charged upon the frontagers, but should be deleted from the provisional apportionment. The question for us is whether or not, in coming to that conclusion, the justices came to a correct determination in point of law. The argument in this case has covered no small amount of ground, and our attention has been directed to various cases. Unfortunately, the circumstances of

this case seem to be so different that they throw very little light upon the particular problem with which we have to deal. To state it shortly, I think that the conflict can be put in this way. On the part of the frontagers, it was contended that these gullies and their connections, properly regarded, were part of the sewer system, and ought to be borne, so far as expense is concerned, not so much by the frontagers in that particular part of East Barnet, as by the ratepaying body as a whole. On the other hand, it was contended by the urban district council that, properly regarded, these expenses were expenses connected with the making up or making good of the street, and relating, not indeed to the sewer which ran down the main road, but to the supply to that sewer of the individual contributions, whether from the adjoining houses or from the surface of the street. A B

It seems to me that light is thrown upon the matter by the view which was expressed, not indeed approved and confirmed, but not dissented from, by the other members of the court, by LORD ALVERSTONE, C.J., in *Wandsworth Borough Council v. Golds* (1), at p. 67 : C

The second point relied on by Mr. Danckwerts was that the expense of providing the gullies which formed part of the system of subterranean drainage did not come under the head of paving or forming the road, and consequently was not properly chargeable to the owners. Speaking for myself, I should have great difficulty in coming to the conclusion that the construction of a gully, that is to say, of the connection of the channel with the sewer, is part either of the paving or the formation of the road. The paving of the road is one thing. The making of improved drainage to take away water which will require to be taken away more rapidly in consequence of that paving is another. D

In that particular case, LORD ALVERSTONE, C.J., refrains from expressing a decided opinion. PICKFORD, J., mentions the point without dealing with it. I think that it throws light upon this as a case, and I think that the true *differentia* which we have to bear in mind is a *differentia* between what may be called the system of subterranean drainage, on the one hand, and the paving of the road and matters immediately connected with it, on the other hand. It may be that there is much to be said on both sides, but, as the matter stands, and on the materials before me, I am not prepared to say that these justices came to a wrong conclusion in point of law. I think, therefore, that this appeal ought to be dismissed. E F

HUMPHREYS, J. : I am of the same opinion. One of the contentions urged on behalf of the appellants, as stated in the case, was that these gullies do not form part of any sewer vested in the appellants. Put in that way, I think that it may be that the contention of the appellants is correct, but I think that the test has to be found in the contention as it is put on behalf of the respondents in para. 5 (1) of the case : G

... that the said gullies and connected pipes are and have always been part of the drainage system and form no part of the carriageways of the streets. H

Looked at from that point of view, it appears to me that it is not correct to say that the cost of the provision of new, or the alteration of existing, gullies is a part of the expenses which, under sect. 6 of the Act of 1892,

can be cast upon the frontagers. I therefore agree that the appeal should be dismissed.

LEWIS, J. : I agree.

Appeal dismissed with costs.

A Solicitors : *Lees & Co.* (for the appellants) ; *H. H. Kemp* (for the respondents.)

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

B *Re* NORBURY, NORBURY v. FAHLAND.

[CHANCERY DIVISION (Bennett, J.), **March 10, 1939.**]

Estate and Other Death Duties—"Free of duty"—*Foreign duty.*

C The testator by his will bequeathed the sum of £15,000 free of duty on trust to pay the income thereof to a German subject resident in Germany, and, subject thereto, to fall into his residuary estate. By reason of the life tenant being a German subject, an additional duty became payable in respect of the legacy, and the question arose whether or not the words "free of duty" were to be so construed that duties imposed by foreign law as well as those imposed by English law were to be paid out of the testator's estate :—

D HELD : the duties imposed by foreign law were not payable out of the testator's estate.

[EDITORIAL NOTE. The words "free of duty" have, in general, been construed in as restricted a sense as possible. It was here contended that the words should extend to foreign duties as well as to English duties, but this contention is rejected where there is no context to extend the meaning of these words.]

E AS TO FOREIGN DUTIES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 299-301, para. 312 ; and FOR CASES, see DIGEST, Vol. 21, p. 130, Nos. 955-959.]

Case referred to :

(1) *Re Scott, Scott v. Scott*, [1915] 1 Ch. 592 ; 21 Digest 130, 959 ; 84 L.J.Ch. 366 ; 112 L.T. 1057.

F ADJOURNED SUMMONS by the executors of the will of John Norbury for the determination of the question whether certain foreign duties were payable out of the testator's residuary estate or out of a settled legacy. By his will, dated June 13, 1935, the testator appointed the plaintiffs executors and trustees of his will. By his will he bequeathed G free of duty £15,000 to his trustees with a power of appropriation and investment on trust to pay the income thereof to the defendant Frau M. A. Fahland, a German subject resident in Germany, during her life without power of anticipation, and on her death the trust legacy and the investments representing the same were to fall into residue. The testator was H domiciled in England, and his assets were almost entirely situated in England. By German law, a tax known as the inheritance tax at the rate of 20 per cent. was payable by the legatee in respect of her life interest in the settled legacy. This tax was payable in respect of any gift by will, or *inter vivos*, or any interest under an intestacy, whether the property was situated in Germany or elsewhere. The only person liable to pay

inheritance duty was the beneficiary. The question asked in the summons was whether, on the true construction of the will, the plaintiffs, as executors, or the legatee ought to bear the inheritance tax payable under German law in respect of the life interest in the settled legacy, having regard to the words "free of duty" included in the bequest.

Wilfrid M. Hunt for the plaintiffs, the executors and trustees of the A
will.

L. W. Byrne for the defendant, the life tenant of the settled legacy.

Norman D. Ouwry for the residuary legatee.

BENNETT, J. : I have been told that there is no direct authority B
on the question raised for decision by this summons. In *Re Scott, Scott v. Scott* (1), the decision of the Court of Appeal did not cover the point. An English testator is to be presumed to know something of the duties imposed by the English law both on his estate and on beneficiaries under his will when he dies, but I do not suppose that many of them know much, C
if anything, about death duties imposed by the laws of foreign countries. Nor do I suppose that many of them would contemplate some additional burden being imposed on their estates by a change of residence on the part of a person to whom a legacy had been given. Since there appears to be no authority, I hold that, where an English testator by an English will D
gives a pecuniary legacy "free of duty," the only duties payable out of his estate in respect of the legacy are duties imposed by English law, unless there are words in the will making it clear that duties imposed by the law of a foreign country are to be paid out of such estate.

Solicitors : *Ouwry & Co.* (for all parties). E

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

Applied. Re CUNLIFFE-OWEN (decd.).
[1951] 2 All E.R. 220.

R. v. BOYCOTT AND OTHERS, *Ex parte* KEASLEY. F

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), April 25, 26, 1939.]

Education—Mental deficiency—Schoolboy certified by two medical officers but examined by one only—Certificate by boy's doctor that boy fit to be educated at council school—Whether "case of doubt"—Whether certification by medical officers an administrative or a judicial act—Mental Deficiency Act, 1913 (c. 28), s. 31 (1)—Education Act, 1921 (c. 51), s. 55 (6). G

A boy, aged 11, had been attending a county council school for several years. In 1937, the headmaster wrote to the boy's father saying that the boy was to be medically examined. The boy was later medically examined, and in Sept., 1937, the father received a letter from the local education sub-committee stating that the boy was to be examined with a view to his transfer to a special school. The father strongly objected to the boy being treated as an imbecile or feeble-minded, and maintained that he was fit for ordinary elementary education. He thereupon had the boy medically examined by his own doctor, who reported that he was quite capable of being educated at the council school. Later the doctor's report was confirmed by a specialist. In H

Oct., 1938, the father received notice that the boy had been certified as an imbecile, with the result that the boy was treated as ineducable and remained at home. The document which purported to certify the boy as an imbecile was signed by two doctors, the certifying medical officer and the school medical officer, but it was admitted that the second signature was purely formal, as the second doctor had never even seen the boy. The boy, suing by his father, now sought to have the certificate and relative documents quashed, on the ground that, *inter alia*, as this was a case of doubt within the meaning of sect. 31 of the Act of 1913, he had been wrongly certified as an imbecile and there had been an excess or usurpation of jurisdiction in obtaining the certificate and the relative documents, which consisted of a report by the two medical officers bearing the same date as that of the certificate, and a notification sent by the clerk to the education committee to the Mental Deficiency Act committee of the county council requesting them to consider the advisability of arranging for the transfer of the boy on the footing that he was an imbecile. On behalf of the respondents, it was contended, *inter alia*, that the present proceedings were misconceived, as the documents sought to be quashed arose from administrative acts, and did not arise from the acts of a judicial authority :—

HELD : (i) as this was a case of doubt to be determined by the Board of Education within the meaning of sect. 31 of the Act of 1913, there was an excess or usurpation of jurisdiction in obtaining the documents, and the boy was wrongly certified.

(ii) the certificate complained of was created in such a way that it took the form of a decision of a quasi-judicial authority, and, together with the other documents, exhibited the mischief which the remedy provided by the writ of *certiorari* was intended to prevent.

[EDITORIAL NOTE. The Mental Deficiency Act, 1913, s. 31, provides that, where there is a case of doubt as to whether a child is or is not capable of receiving instruction in any special school, the matter shall be determined by the Board of Education. In the present case, the child had been examined both by the medical officer of the local authority and by doctors on behalf of the parent. The opinions given were diametrically opposed, and it is held that this was clearly a case of doubt within the meaning of the section. The further point is raised whether the decision of the medical officer in such a case is an administrative or a judicial act, since, if it were only an administrative act, it could not be a subject for the consideration of the Divisional Court upon a rule for an order of *certiorari*. The validity of the Mental Deficiency (Notification of Children) Regulations, 1928, was argued, but the court did not find it necessary to pronounce an opinion upon this question.

AS TO DUTIES OF LOCAL EDUCATION AUTHORITY IN RESPECT OF MENTAL DEFECTIVES, see HALSBURY, Hailsham Edn., Vol. 21, p. 492, para. 894 ; and FOR CASES, see DIGEST, Vol. 19, p. 569, Nos. 98, 99.]

Case referred to :

- (1) *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171 ; Digest Supp. ; 93 L.J.K.B. 390 ; 130 L.T. 164.

MOTION on behalf of Stanley Keasley, aged 11, suing by his father, Russell Keasley, Harpenden, Herts, for an order of *certiorari* to remove and quash the three documents complained of. The facts and the arguments are set out in the judgments.

Norman Birkett, K.C., and *Edward Terrell* for the applicant.

John Morris, K.C., and *R. Moelwyn Hughes* for the respondents, the Hertfordshire County Council, the Harpenden urban local education sub-committee and two medical officers.

LORD HEWART, L.C.J. : This is a motion for an order of *certiorari* to remove and quash three documents—namely, a certificate of Oct. 5, 1938, a report of Oct. 5, 1938, and a letter signed by the clerk to the education committee and addressed to the clerk to the Mental Deficiency Act, 1913, committee dated Oct. 10, 1938.

The matter arises in a way which is capable of short statement, although the argument has covered, and rightly covered, a good deal of ground. I do not propose to examine in detail the relevant provisions of the Mental Deficiency Act, 1913, the Education Act, 1921—in particular, Part V of that Act—and the Mental Deficiency Act, 1927. Those Acts have been explored and expounded at considerable length, and we have also had before us the regulations made by the Board of Education under the name of the Mental Deficiency (Notification of Children) Regulations, 1928, dated Sept. 6, 1928. I pause to say in regard to that body of regulations—not a large body in point of volume, but important in point of substance—that, in the view which I take of this case, it is not necessary that I should dwell upon them. It was urged, and strongly urged, by Mr. Norman Birkett, in applying for this order of *certiorari*, that those regulations were in fact and in law *ultra vires*. There is no doubt a good deal to be said for that view, but at this time, and with reference to this case, it does not seem to me to be necessary that that question should be decided. Upon the assumption that those regulations were, as Mr. Birkett contends they were not, *intra vires*, nevertheless it seems to me that the consequences which I am about to mention follow in any case. The matter arises in this way, and it is of great importance to the individuals concerned, because it affects, and closely affects, the present position and future prospects of a boy now about 11 years of age. What is said with regard to him is that he was wrongly certified, contrary to the statutes and the regulations, as being an imbecile within the meaning of the Mental Deficiency Act, 1913, and that, in the course of making or obtaining the requisite documents for that purpose, there was an excess or usurpation of jurisdiction on the part of a body which claimed to be acting in the exercise of a judicial authority.

The facts of the case have been very carefully traced through a mass of affidavits. I do not propose to recapitulate that dismal story. What emerges is that by a purported certificate, dated Oct. 5, 1938, over the hands of two medical gentlemen, one describing himself as the certifying medical officer and the other describing himself as the school medical officer, that lad was certified to be an imbecile. There is now in my hand a copy of the certificate signed by Dr. Boycott and Dr. Hyslop Thomson with reference to the child Stanley Keasley of Harpenden, purporting to be given under the Education Act, 1921, and under the Mental Deficiency Acts, and that certificate is in the following terms :

I certify that this child is incapable by reason of mental defect of receiving benefit from instruction in a special school or class under the Education Act, 1921,

s. 56. He is an imbecile within the meaning of the Mental Deficiency Act, 1913, as amended.

Then there follow two signatures.

A In the course which this case has taken, it is now common ground, and is admitted, that the second of those two signatures was purely formal. It is an illustration of what is called, I think, internal administrative system. In plain English, the name of Dr. Hyslop Thomson appears on that certificate as certifying this child to be an imbecile when *ex concessis* he had never even seen the lad. Unfortunately it is a little difficult to envisage the consequences which that document so B brought into existence may have had. In the Mental Deficiency Act, 1913, s. 31, the duties of local education authorities are very clearly set forth. That section provides as follows :

C (1) The duties of a local education authority shall include a duty to make arrangements, subject to the approval of the Board of Education, (a) for ascertaining what children within their area are defective children within the meaning of this Act ; (b) for ascertaining which of such children are incapable by reason of mental defect of receiving benefit or further benefit from instruction in special schools or classes ; (c) for notifying to the local authority under this Act, the names and addresses of defective children with respect to whom it is the duty of the local education authority to give notice under the provisions herein before contained.

Then follow these extremely important words :

D In case of doubt as to whether a child is or is not capable of receiving such benefit as aforesaid, or whether the retention of a child in a special school or class would be detrimental to the interests of the other children, the matter shall be determined by the Board of Education.

E Upon the facts disclosed by these affidavits, it is in my opinion manifest that with regard to this lad, Stanley Keasley, a doubt did arise, and was bound to have arisen, upon the question whether or not he was capable of receiving benefit as is set forth in the statute. It is quite obvious, when one considers the contents of these affidavits, that the boy's father was repeatedly saying with regard to this lad, who had been at school F from the age of 5 years without unfavourable report, that it was wrong to treat him as being either feeble-minded or *a fortiori* as an imbecile, and the father was strongly objecting to measures which seemed at that point to be foreshadowed. The father went to the length, and incurred the expense, of obtaining the views of two doctors, and was thereby fortified G in his view that the lad was not within the category of the feeble-minded or the imbecile.

H It is impossible for us to decide, nor should we dream of undertaking the task of deciding, what the true conclusion upon that matter was. What does appear clearly, however, is that the case was eminently one to be determined by the Board of Education in manner contemplated by the Mental Deficiency Act, 1913, s. 31. However, such had been the history of this case, and in particular such had been the documents brought into existence, that no question was even entertained as to whether the Board of Education should determine a matter of doubt. It was not even admitted that there was a doubt, and so the case went on to its

issue, when, in the result, there was a finding against this lad which precluded him from continuing his education in an ordinary public elementary school. At present we are told that he is at home, and not receiving any education at all. Indeed, on the documents, apparently he is treated as being a person who is ineducable, a person whom it would not be worth while to try to educate.

A

The root of that trouble is, in my opinion, to be found in this document which is first impugned among the documents referred to in this notice of motion—namely, the document where each of the two medical officers, one described as the certifying medical officer and the other described as school medical officer, has put his signature to a certificate in the first person in these terms :

B

I certify that this child is incapable by reason of mental defect of receiving further benefit from instruction in a special school or class under the Education Act, 1921, s. 56. He is an imbecile within the meaning of the Mental Deficiency Act, 1913, as amended.

Of those two medical officers there was only one—namely, the certifying medical officer—who had ever examined this lad at all. In the circumstances, that document is, to say the least of it, to be regretted, and, as Mr. Birkett has contended (and I think properly contended), that document was but a part of a larger whole. It seems to me to be true to say that that document, the certificate of Oct. 5, ought to be treated side by side, for the purposes of the question which we have to consider, with the report, also dated Oct. 5, 1938, and a letter, to which reference has already been made, dated Oct. 10, 1938. By the report of Oct. 5, 1938, Dr. Boycott, in his own proper person as certifying medical officer, states as follows in his general observations with regard to this lad :

C

D

E

He has made no improvement since he was examined last May [May, 1938], and should now be classed as an imbecile. He is not educable at a special school but should benefit at an occupational centre.

That document has not the vice, exhibited by the certificate of Oct. 5, of bearing on its face the signature of a doctor who had never seen the lad, but it is a document which, it seems to me on careful consideration, should be treated side by side with the certificate of Oct. 5. In the same category comes the letter dated Oct. 10, 1938, over the hand of the clerk to the education committee, a letter addressed to the clerk to the Mental Deficiency Act, 1913, committee in these terms :

F

G

I am directed to forward herewith copy of the report of Dr. Norman Boycott on form 306 M with regard to this boy and am to request that the committee under the Mental Deficiency Act will be so good as to consider the advisability of arranging for the boy to be medically examined with a view of his certification and transfer to Cell Barnes Colony as early as is practicable.

Then there follow the full name and address of the father.

H

In my opinion, Mr. Norman Birkett is right in contending that, in the circumstances of this case, those three documents ought fairly to be regarded as one entity. It has been urged by Mr. Morris, in his very able argument in opposition to this rule, that the circumstances relating to the signature of the school medical officer on the certificate of Oct. 5 do

not detract from the validity or the force of the signature of the certifying medical officer, and that we ought to treat this document of Oct. 5 as if, for the purpose of the argument, there were only one signature, and as if the signature of the school medical officer were obliterated or forgotten. I cannot take that view. We have seen something of the way in which

A that document might be employed, and it seems to me to be a most injurious and unfortunate thing that there should be in existence, over the hand, no matter with what mental reservation, of two medical gentlemen, a certificate describing this lad as an imbecile within the meaning of the Act of 1913. Nevertheless, it is also contended, and

B forcibly contended, by Mr. Morris that these proceedings are misconceived, inasmuch as those three documents, whether they be regarded jointly or severally, are exemplifications, not of judicial proceedings, but merely of administrative acts. Our attention has been directed to the very well-known case of *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1), and the judgment therein delivered by ATKIN, L.J., as he then was. In my opinion, the authority of that case is against the view for which Mr. Morris is contending. In that case, to pass over other matters, ATKIN, L.J., laid down this proposition, illustrated indeed by the facts of that case, but going beyond the mere

C facts of that case. He said, at p. 205 :

D

Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

E In my opinion, on the facts of this case, this certificate of Oct. 5, 1938, created in the way in which we know that it was created, purported to be and to look like the decision of a quasi-judicial authority, and I think that similar considerations apply to the two documents, one also dated Oct. 5, and the other dated Oct. 10, which it is contended (and I think

F rightly contended) ought to be regarded as part and parcel of one and the same transaction. I think that these three documents do come within the range of the jurisdiction of this court in *certiorari*.

Let me add this only. A good deal of ground has been traversed and explored in this careful and interesting argument on both sides. Various questions have been mooted which, in my opinion, do not in this case

G necessarily arise, and which I shall not take up time by particularising or exploring. It may be that there will be other occasions when some of those questions will call for examination, but, in the meantime, I am satisfied that, as Mr. Birkett has so forcibly argued, this is a case fit for the jurisdiction of *certiorari*, and that these three documents—two of

H Oct. 5, 1938, and one of Oct. 10, 1938—exhibit the mischief which the remedy by *certiorari* is well fitted to correct. I think, therefore, that this motion ought to be granted and this order made.

HUMPHREYS, J. : I agree. In my opinion, the order of *certiorari* ought to go in this case in regard to all three documents. In regard to

the most important of those three—namely, the certificate of Oct. 5—as I understood the argument of Mr. Morris, he was not in a position to contend that, if that document was one which could not be allowed to stand, and ought not to stand, it was not a document which, in the circumstances, would fall within the language used by ATKIN, L.J., in *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1), to which my Lord has referred. Therefore, as I understood his argument, he was admitting (and certainly not contending to the contrary) that, if that document was a document exhibiting the defects which it was alleged to exhibit, it might be the subject of this order of *certiorari*. That document, in my opinion, was a document of the highest possible importance in the life of this lad of 11 years of age. It purported to class him as an imbecile within the meaning of that term as used in the Mental Deficiency Act, 1913. It was in fact one of the steps necessary in his case, and was intended to be an early stage in a chain of circumstances which would ultimately result in an order being made in regard to that boy under sect. 6 of that Act, an order which would be made truly by a judicial authority, and the order would be one ordering that child to be sent to an institution.

For the reasons which my Lord has stated and expressed, in my view, that document was in a most unfortunate form. It was a document which was calculated—not intended, but calculated—to deceive any person who read it, so that they would believe that it was in truth and in fact the certificate of two independent medical men, who, after examination, had come to the conclusion that this boy was an imbecile, whereas in truth and in fact one of those persons, so far as the evidence in this case goes, had never even set eyes on the boy. For those reasons, I agree that certificate is a document which ought to be quashed.

With regard to the other two documents, it may be—for my own part, I am content to assume that it would be—that this court would not quash either of those documents by *certiorari* if they stood alone, and were altogether apart from the certificate. I cannot doubt, however, that this court has authority, in quashing a document which is clearly a document of such a nature as to be affected by the rules in regard to *certiorari*, to add to its order such documents as go with it, or are consequential to it, or follow upon it. It is in that way that I regard the other two documents in this case, which should, I think, be the subject of the order asked for.

I also agree that it was, to say the least of it—the father of this child having intimated in the earliest stage that on medical grounds, and as the result of medical advice, he was contesting the idea that this child was one who was unfit to be educated, and incapable of being usefully the subject of education—peculiarly unfortunate in this case, having regard to the language of sect. 31 of the Act under which these proceedings were taking place, that there was no reference by the local educational authority to the Board of Education. The language of sect. 31 and the

last paragraph of it is plain, and it is general. It provides as follows :

In case of doubt as to whether a child is or is not capable of receiving such benefit as aforesaid [the benefit of education], or whether the retention of a child in a special school or class would be detrimental to the interests of the other children, the matter shall be determined by the Board of Education.

- A We have had before us correspondence which shows that the father asked in terms that that matter might be referred to the Board of Education, and I think it most unfortunate that that request was not complied with. However that may be, I desire to say no more about that or any other of the matters which have been argued in this case. For
- B the reasons which my lord has expressed, I agree that the order should issue in regard to all three documents.

- C SINGLETON, J. : I am of the same opinion, and I only add a few words because of the manifest importance of this case both to the infant boy and his parents, on the one hand, and to the local authority charged with certain duties, upon the other hand. No one can disguise the fact that those who are charged with duties under the Education Acts and under the Mental Deficiency Acts have a considerable burden thrust upon them, and this court ought not lightly to interfere unless something has taken place which was not in accordance with the terms of the
- D Acts under which the local authority or local education authority was acting.

- E At the commencement of this case, there was some uncertainty as to whether the action which had been taken was taken under the Education Act, 1921, or under the Mental Deficiency Act, 1913, as amended by the Act of 1927. We were referred by Mr. Birkett to the Education Act, 1921, Part V, and in particular to sect. 55 of that Act, which has the following marginal note :

- F Duty of local education authority to determine what children are defective or epileptic.

- As to this child, it was said by the certificate which is called in question that the child was an imbecile, and sect. 55 of the Act does not deal with imbeciles. It then became apparent, and was agreed by counsel, that all that we had to consider in this case was the Mental Deficiency Act,
- G 1913, and the regulations made thereunder. However, it is important, as I think, to observe that in the Education Act, 1921, s. 55, there is a provision similar to that which occurs in the Mental Deficiency Act, 1913, s. 31 :

- H (6) In case of doubt as to whether a child is or is not defective or epileptic within the meaning of this part of this Act, the matter shall be determined by the Board of Education.

In the Mental Deficiency Act, sect. 1 sets out certain definitions, including the definition of " imbecile," which is amended slightly, but to no material extent for this purpose, by the Act of 1927. Sects. 2, 3, 4, 5 and 6 deal with what shall be done, or could be done, in the case of a

mental defective. Sect. 31, which lays down the duties of local education authorities, provides as follows :

(1) The duties of a local education authority shall include a duty to make arrangements, subject to the approval of the Board of Education, (a) for ascertaining what children within their area are defective children within the meaning of this Act. . . . In case of doubt as to whether a child is or is not capable of receiving such benefit as aforesaid, or whether the retention of a child in a special school or class would be detrimental to the interests of the other children, the matter shall be determined by the Board of Education.

Thus in both Acts the legislature seeks to maintain, and does maintain, the position that, in case of doubt, the matter is to be determined by the Board of Education.

What are the circumstances of this case ? The boy, Stanley Keasley, was born on May 3, 1927. According to the affidavit of the school-master, Mr. Watts, he went to school on Sept. 6, 1932—that is, when he was a little under 5½ years of age. On Sept. 10, 1935, he was transferred to the senior department, and since that time he has been under the observation of the headmaster, Mr. Watts. Apparently there was no communication to the parents of anything wrong with the child until 1937, or thereabouts. In 1937, when a suggestion was made and the child was examined, the father and mother were communicated with, and then someone on behalf of the county council or the Harpenden Urban District Council saw the father, and, in a letter, dated July 17, 1937, which is exhibited to the affidavit of Mr. Tuckey, reported in these terms :

I have to-day interviewed the father of the above-named and the information required is withheld and the following objections are put as the father's reasons for so doing. That he (the father) has never at any time been notified that there was or is now anything wrong with the boy to cause it necessary for him to be taken away to a special school. That the father is of the opinion that the boy is not as stated feeble-minded this being supported by his own medical officer together with that of a medical attendant at the Ear, Nose and Throat Hospital, Gray's Inn Road. The father also asserts that he is prepared to go the full limit of defending him in a court of law if such extremes are necessary.

That is on July 17, 1937. At that time, the boy had been examined once by Dr. Boycott. He was examined again later on two occasions. On May 9, 1938, Dr. Boycott again certified that the boy was feeble-minded. On Oct. 5, 1938, a further examination by Dr. Boycott took place, and it is in respect of the certificate and the report rendered thereafter that this motion comes before the court.

The certificate of Dr. Boycott is on a printed form under the Education Act, 1921, Part V, and the Mental Deficiency Acts, 1913 to 1927. I assume that it is a form provided by the Hertfordshire County Council. The certificate in Sched. C is in the following terms :

I certify that this child is incapable by reason of mental defect of receiving benefit from instruction in a special school or class under the Education Act, 1921, s. 56. He is an imbecile within the meaning of the Mental Deficiency Act, 1913, as amended. Dated Oct. 5, 1938. Signed A. N. Boycott, M.D., Certifying Medical Officer. Signed H. Hyslop Thomson, School Medical Officer.

In view of what had taken place, and in view of the earlier examinations which had been made, I find it a little difficult to see how the

examiner, Dr. Boycott, arrived at the conclusion on that examination that the child was an imbecile within the meaning of the Mental Deficiency Act, 1913. Dr. Boycott may have had (and I daresay he had) good grounds for it, in his view, but I am bound to say that, in view of what had taken place before, and in view of the claims of the parents at that time, I think that there was a case of doubt, which ought to have been determined by the Board of Education. It is true, as HUMPHREYS, J., said in his judgment, that a short time afterwards the father expressly made that request. I think it was the duty of the local authority, in the circumstances of this case, to have that matter determined by the Board of Education, in view of what happened before. What took place was that, Dr. Boycott having signed the certificate, the certificate went apparently to Dr. Hyslop Thomson, the school medical officer, who appended his signature to the certificate and then sent forward the report, putting on the report: "Imbecile—ineducable." Then the report went forward to the education officer of the county council.

Mr. Morris told us that the case was not considered by any committee. He said that the ascertainment under the Mental Deficiency Act, 1913, s. 31, was really the act of Dr. Boycott, and to that extent his act must be regarded as a judicial act. That I understood to be his admission. Mr. Morris said further that the certificate of Dr. Boycott is none the worse for having upon it the signature of Dr. Hyslop Thomson. For myself, I am clearly of opinion, as I have said already, that, there being a case of doubt, there was no right or power in the local educational authority, or in any one but the Board of Education, to determine that matter, and I should be prepared to quash this certificate on that ground alone. However, there is another, and, as I think, a more important, ground than that. This certificate certifying that the child is an imbecile within the meaning of the Mental Deficiency Act bears the signature of two doctors, one of whom said: "I never saw the child." How that doctor can put his hand to a certificate in those terms, for administrative or for other purposes, I wholly fail to understand, and I think that it would be wrong that a certificate such as that should be allowed to remain in existence.

It is admitted that this court has power with regard to that certificate, and, there being that power, I think that we should be failing in our duty if we failed to quash that certificate, which, going forth to anyone or, to any body of persons, would lead him or them to think that the boy had been examined by two doctors, both of whom certified that he was an imbecile. No such state of things existed. I hope that never again will it be found that a doctor has put his hand to a certificate of that kind without realising what it means, and how it may be interpreted by others. For those reasons, I think that the certificate must be quashed. The other two documents are obviously of much less importance, but I agree that they ought all to be taken together, and that, in the circumstances of this case, the same result ought to apply with regard to the others.

As to the argument that the regulations made under the 1913 Act are *ultra vires*, I think that it is quite unnecessary for this court to consider that point, or to say anything with regard to it. The same observation applies to the argument about reg. 5. I agree that the rule should be made absolute.

Rule made absolute with costs against the respondents.

Solicitors: *Shaen, Roscoe, Massey & Co.* (for the applicant); *Sharpe, Pritchard & Co.*, agents for *Elton Longmore*, Hertford (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

STANLEY v. THOMAS.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Lewis, JJ.), **May 1, 2, 1939.**]

Street Traffic—Motor vehicle—Charge of dangerous driving—Notice of intended prosecution sent to accused's residence by registered post—Accused known to be in hospital at time as result of accident—Notice returned marked "unable to deliver"—Fresh notice served personally out of time—Whether adequate notice—Road Traffic Act, 1930 (c. 43), s. 21.

The respondent was charged with unlawfully driving a motor vehicle on a certain road in a manner dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11. In consequence of the accident which gave rise to the charge, the respondent was rendered unconscious, and therefore could not be warned, pursuant to sect. 21 of the Act of 1930, at the time of the alleged offence that the question of prosecuting him would be considered. He was removed to a hospital in the district, where he was detained from Sept. 8, 1938, till Sept. 18, 1938. On Sept. 13, the appellant, the superintendent of police, sent a notice of intended prosecution to the respondent by registered post, addressed to the respondent's usual place of residence, although the appellant knew that the respondent was then in hospital. The period of 14 days within which notice of intended prosecution is required to be given by sect. 21 of the Act of 1930 expired on Sept. 22. On Sept. 14, the respondent was interviewed at the hospital by a police sergeant. On Sept. 23, the notice was returned to the appellant marked: "Unable to deliver." The respondent was discharged from hospital on Sept. 18, but did not return to his home until Sept. 23. On Sept. 26, when the respondent was visiting the hospital, a notice of intended prosecution was served on him personally. Between Sept. 8 and Sept. 23, the respondent's place of residence was closed and unoccupied. The justices dismissed the charge, holding that there had been no compliance with sect. 21, which requires service of notice of an intended prosecution on an accused person, or that it be "sent by registered post to him," within 14 days of the commission of the offence:—

HELD: as the words in sect. 21 of the Act of 1930 were "sent to him," and not "sent to him and received by him," the requirement of sect. 21 was, in the circumstances of the present case, duly complied with.

[EDITORIAL NOTE.] The point upon which this case is decided is that the statute only requires that the notice shall be sent to the person intended to be prosecuted, and does not require that it shall be received by him. The judgment,

however, does envisage a case in which the notice is deliberately sent to an address where the intended recipient is unlikely to be, and states that in such a case a different view might be taken.

AS TO NOTICE OF INTENDED PROSECUTION, see HALSBURY, Hailsham Edn., Vol. 31, pp. 680, 681, para. 1008; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 245a-245c.]

A

Case referred to :

(1) *Retail Dairy Co., Ltd. v. Clarke*, [1912] 2 K.B. 388; 25 Digest 100, 235; 81 L.J.K.B. 845; 106 L.T. 848.

B

APPEAL by way of case stated from a decision of the justices for the borough of Sutton Coldfield. The facts and the arguments are set out in the judgment of LORD HEWART, L.C.J.

Vernon Gattie for the appellant.

The respondent was not represented.

C

LORD HEWART, L.C.J.: This is a case stated by justices for the borough of Sutton Coldfield. It arises upon an information preferred by the superintendent of police, here the appellant, against the respondent for that the respondent on Sept. 8, 1938, unlawfully did drive a motor vehicle on a certain road in a manner which was dangerous to the public,

D

having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which was actually at the time, or which might reasonably be expected to be, on the road, contrary to the Road Traffic Act, 1930, s. 11. The justices, having heard the evidence, dismissed the information, and the question

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for us is whether in so doing they came to a correct determination in point of law.

The facts of the case are quite simple, and they give rise to a plain and simple question. It is found that, as a result of the accident which gave rise to the information, the respondent was rendered unconscious, and it was therefore not possible, the case says, pursuant to the Road Traffic Act, 1930, s. 21, to warn him at the time the alleged offence was committed that the question of prosecuting him for an offence would be considered. He was removed to the cottage hospital in Sutton Coldfield, and there he was detained from Sept. 8, 1938, until Sept. 18,

G

1938, the accident having happened on Sept. 8. Afterwards, on Sept. 13, the appellant—that is to say, the superintendent of police—sent a postal packet containing a notice of the intended prosecution of the respondent, specifying the nature of the alleged offence contrary to the statute, and the time and place where it was alleged to have been

H

committed. He sent that postal packet by pre-paid registered post, addressed to the respondent at his residence in Tarvan Road, Chester, which, the case says, was admitted to have been, at that time, the usual residence of the respondent. It is further found that it was admitted that, at the time when the postal packet was posted—that is to say, on Sept. 13—the appellant knew that the respondent was at the

cottage hospital in Sutton Coldfield. There was no objection to the form of the notice.

On Sept. 14, the respondent was interviewed at the cottage hospital by a sergeant in the Warwickshire constabulary stationed at Sutton Coldfield on behalf of the appellant, and on the same day the respondent made a statement to that sergeant. The period of 14 days, the case continues, within which a summons is required to be served or a notice of intended prosecution is required to be given pursuant to the Road Traffic Act, 1930, s. 21, if no warning has been given at the time of an alleged offence, expired on Sept. 22. On Sept. 23, the appellant received a returned letter package from the post office containing the postal packet which had been sent by registered post, and the postal packet so returned was marked: "Unable to deliver." Inquiries showed that the respondent had been discharged from the hospital on Sept. 18, but further inquiries to locate him, as the expression is, were made without result. The appellant ascertained that the respondent was expected to visit the cottage hospital at Sutton Coldfield on Sept. 26, and on that day the respondent was interviewed and a notice of intended prosecution was served upon him personally. Then finally the case finds that, during the period from Sept. 8 to Sept. 23, the respondent's residence in Chester was closed and unoccupied. The respondent was staying with friends in Birmingham from the date of his discharge from the cottage hospital—namely, Sept. 18—until he returned to Chester on Sept. 23. The summons in fact was served on Oct. 25.

In those circumstances, it was contended on the part of the superintendent of police, the appellant, (i) that it was not the practice to serve notices of intended prosecution on a patient whilst he was in hospital suffering from injuries, and that there were occasions when persons were so seriously ill that notices could not be served on them, and (ii) that, as the appellant had sent the notice by registered post to the respondent's usual residence on the fifth day after the date of the alleged offence, he had complied with the requirements of sect. 21 of the Act of 1930, and the fact that there was no one there to receive it was no fault of the appellant. It was also contended that, when it became known to the appellant that the registered letter had not been delivered, the period of 14 days had already elapsed, and a fresh notice was served on the respondent personally at the first opportunity—namely, on Sept. 26.

On the other hand, it was contended on the part of the respondent that, as the respondent was fit to be interviewed on Sept. 14, the day following the day on which the registered letter had been posted, the notice of intended prosecution could and should have been served on the respondent personally at that interview at the cottage hospital, and that the notice of intended prosecution served on the respondent personally on Sept. 26 was served out of time and was bad.

Those were the contentions on the one side and on the other, and the

justices, in those circumstances, came to a conclusion which they have expressed in this way :

A We were of opinion that as the words used in the Road Traffic Act, 1930, s. 21, were "served on or sent by registered post to him," and not, for example, as in the Service of Process (Justices) Act, 1933, s. 1 (1), "by post to the defendant in a pre-paid registered letter addressed to him at his last or usual place of abode," a notice of intended prosecution under the Road Traffic Act, 1930, s. 21, must either be served personally or sent by registered post to the place where the addressee actually is at the time when it is delivered.

B The justices were further of the opinion that the notice of intended prosecution could have been served on the respondent at the cottage hospital within the period of 14 days after the date of the alleged offence, and that the sending of the notice of intended prosecution under sect. 21 of the Act of 1930 to the respondent at an address where, as the police knew, he was not, and could not for sufficient reason have been, at the time, and which was temporarily unoccupied, could not be proper service under sect. 21 of the Act of 1930. Holding those opinions, the justices held that there had been no compliance with the requirements of sect. 21 of the Act of 1930, and they accordingly dismissed the information.

C It may be well to recall the words of sect. 21 so far as they are material. D The Road Traffic Act, 1930, s. 21, provides as follows :

E Where a person is prosecuted for an offence under any of the provisions of this part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either (a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration ; or (b) within 14 days of the commission of the offence a summons for the offence was served on him ; or (c) within the said 14 days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence.

F There follow two provisos, neither of which can be said to apply to this case.

G Much has been said, and well said, by counsel for the appellant on the important point : "unless a notice was served on or sent by registered post to him." It is to be observed that the words are "sent to him," not "sent to him and received by him," and a passage in the judgment of A. T. LAWRENCE, J., as he then was, in *Retail Dairy Co., Ltd. v. Clarke* (1) seems to be apposite. That was a case in which, with reference to a warranty or invoice under the Sale of Food and Drugs Act, 1899, it was held as follows :

H ... in the absence of any words in the subsection indicating that the word "sent" is used with any other than its ordinary meaning of "dispatched" it must be construed as bearing that meaning, and that if a copy of the warranty with the written notice is posted to the purchaser within 7 days from the issue of the summons it is "sent" in compliance with the requirement of the subsection although it does not reach him till after the expiration of the 7 days.

Later, A. T. LAWRENCE, J., concurring in the judgment delivered by

RIDLEY, J., which was afterwards concurred in by PICKFORD, J., said, at p. 396 :

I do not think we can make additions to the words of the statute. The documents in question were "sent" within 7 days after the service of the summons. They were sent by post in the ordinary way. All the statutes which were dealt with in the cases which have been cited contained words which indicated some meaning other than the natural one of the word "send." There is no such qualification in the statute with which we have to deal. In my judgment the documents were sent within the 7 days as required by the statute, and as they were so sent the object of the statute was attained. The purchaser received notice of the defence which was going to be set up 9 days before the hearing, and there is nothing which compels us to prevent the case being dealt with on the merits.

That case seems to be a clear and relevant authority on the meaning of the words "sent to him." Our attention has been in the same context invited to the Interpretation Act, 1889, s. 26, which provides as follows :

Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send," or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

There was a moment when it seemed to be suggested that the word "properly" before the word "addressing" in that section might give rise to a difficulty. I cannot help thinking that the meaning of the expression "properly addressing" is confined to the accuracy and propriety of the address, and does not refer to any surrounding circumstances affecting the question whether or not it was being sent to the proper destination.

Here, by a combination of accidental circumstances, including the fact that the respondent, when he was well enough to be moved from the cottage hospital, did not go home, but went to see some friends in Birmingham, and stayed there for some time, the document did not reach his hands within the time contemplated by the statute. On the other hand, it was posted at a time when it might well have been expected that before the expiration of the period named in the statute it would, in the ordinary course, reach the respondent.

Other considerations, no doubt, would apply if it appeared that the sender of the notice either deliberately sent the notice to a place where he knew that the intended recipient was not, and was not likely to be, or in any other way deliberately defeated the intention of this statute, which is undoubtedly to give proper notice. However, I see no ingredient in this case which suggests any such conclusion. At the time when this letter was posted, and posted by registered post to the address of the respondent, the sender had reason to believe that the letter would reach him before the termination of the allotted time, and I think that the fair inference is that the document was posted as and when it was with the intention that it should reach the respondent within the allotted time. In those circumstances, it seems to me that the act prescribed by this statute was duly performed, inasmuch as notice was sent by

- registered post to the respondent at a time when, in the ordinary course, it might properly have been expected to reach him. As I say, other considerations may apply where the circumstances are of a different kind. It would be an outrageous thing if this section were employed dishonestly to prevent a potential defendant from receiving adequate notice. That consideration, however, does not arise here, and I think that this document may rightly be said to have been sent to the respondent. If that is so, these justices, with the best will in the world, took a wrong view of the meaning of this section, and the case ought to go back to the justices with a suitable direction. I say with a suitable direction because it does not fully appear from the case whether all the relevant facts were before the justices or whether this was something in the nature of a preliminary point. However, so far as this court is concerned, and if there is no other evidence sought to be offered on the part of the respondent, it is apparent that the charge which was made was proved. I think, therefore, that this appeal ought to be allowed.

- HUMPHREYS, J.: I am of the same opinion. I think it a matter of regret that this case was not also argued on behalf of the respondent, but counsel for the appellant has put forward in this court all the relevant considerations which I think could have been put forward by counsel for the respondent if the respondent had been represented. I am satisfied that the result would have been that which appears from the judgment of my Lord, with which I agree.

- LEWIS, J.: I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. M. Willis*, Warwick (for the appellant).

[*Reported by* MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

R. v. DACEY.

- [COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), **April 24, 1939.**]

Criminal Law—Malicious damage to property—Explosives—Knowingly in possession of explosives—Proof of knowledge—Explosive Substances Act, 1883 (c. 3), s. 9.

- Upon an indictment against an accused for knowingly having in his possession explosive substances, the prosecution has to prove that the accused was in possession of an explosive substance within the Explosive Substances Act, 1883, s. 9, in circumstances giving rise to a reasonable presumption that that possession was not for a lawful object. Proof of knowledge by the accused of the explosive nature of the substance is not essential, nor need any chemical knowledge on the part of the accused be proved.

[EDITORIAL NOTE.] When the existence of a particular state of mind is a necessary ingredient of the offence, *prima facie* proof of the existence of that state of mind is sufficient to throw the onus on to the accused of disproving the existence in him of that state of mind. The present case shows the application of this general principle to a charge under the Explosive Substances Act, 1883, of knowingly being in possession of explosive substances.

AS TO POSSESSION OF EXPLOSIVE SUBSTANCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 637, 638, para. 1078; and FOR CASES, see DIGEST, Vol. 15, p. 1031, Nos. 11,614-11,621.] A

APPLICATION for leave to appeal against conviction and sentence upon an indictment that the accused knowingly had in his possession or under his control explosive substances. The facts are fully set out in the judgment of the court delivered by HUMPHREYS, J. B

The appellant was not represented and did not appear.

The Crown was not represented.

HUMPHREYS, J. [delivering the judgment of the court]: In this case, the appellant was convicted at the Glamorganshire Assizes on an indictment containing two counts. The first count states as the particulars of the offence that Timothy Dacey on a date named knowingly had in his possession explosive substances, to wit, 20 sticks of gelignite, 16 detonators, a quantity of potassium chlorate, sulphur, paraffin wax, and an alarm clock, in such circumstances as to give rise to a reasonable suspicion that he did not have those explosive substances in his possession for a lawful object. The second count is similar, except that the words are "under his control," instead of "in his possession." He was sentenced to a term of 7 years' penal servitude, and he now applies for leave to appeal against his conviction and sentence. He stated in his notice of appeal that he did not desire legal aid, having already a solicitor who was acting for him, whose name he gave, but he is not represented. This being an application for leave to appeal, he is not entitled to be present, and he is not. The grounds of appeal have evidently been prepared by a lawyer. The fifth ground is as follows: C

... that the conviction was based upon the summing up of the judge during which he [the judge] misdirected the jury in that he failed to adequately explain to the jury the full and legal meaning of the word "knowingly" which appears in the indictment. D

There are other grounds, such as that "the conviction is bad in law." E

The short facts of the case are that the police obtained a search warrant to search the premises of the defendant, and on Jan. 28, 1939, they found him coming out of a cellar. He was told that the premises would be searched for explosives, and he said: "I have a parcel downstairs which was left here about a week ago." He then produced from downstairs a number of parcels done up in brown paper. These parcels were found to contain, amongst other things, a saucepan, a wooden spoon, paraffin wax, and a quantity of potassium chlorate. In a brown leather gladstone bag were found the other matters which are stated in the F

indictment, with the exception of the detonators. These were not found at first, but on a subsequent search by the police they were found hidden under the rafters of the cellar ceiling. The accused was asked to account for these matters, and his explanation was that some man had brought these things to his shop about a week before and had left them there.

- A Evidence was given that upon his clothes were found traces of potassium chlorate, and further evidence was given that potassium chlorate, paraffin wax and sulphur could be prepared in a saucepan and that that mixture would be a powerful explosive which is used for blasting purposes. The materials which were found were materials which come within the definition of explosive substances in the Explosive Substances Act, 1883, s. 9 (1), which provides as follows :

- C The expression "explosive substance" shall be deemed to include any materials for making any explosive substance ; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance ; also any part of any such apparatus, machine, or implement.

- D The appellant gave evidence at the trial, and said that on Jan. 19, 9 days before his arrest, two Irishmen brought the parcel and the glad-stone bag to his shop and said that they were leaving for Cardiff to go to work and would call back in a couple of days and pay him for letting them leave the things. He said that that was how he came to allow the men to put these things in his cellar. With regard to the detonators, he said that he knew nothing about them at all, and did not know how they got there. There were other things found in his possession which were in the nature of documents which the prosecution relied upon, but with which, for the purposes of this application, it is unnecessary to deal.

In his application for leave to appeal, the appellant complains that the judge omitted to explain the meaning of the word "knowingly" in sect. 4 of the Act, which provides as follows :

- F (1) Any person who . . . knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession or under his control for a lawful object, shall, unless he can show that he . . . had it in his possession or under his control for a lawful object, be guilty [of an offence under the statute].

- G The question as to the interpretation of the section does not appear to have been raised at the trial, and in the summing up the judge directed the jury in the terms of the section until towards the end of the summing up, when he said :

What you have to be satisfied upon is : "Did he knowingly have these things in his possession, he knowing that they were explosive substances ?"

- H If that is a correct report of what the judge said, that statement, in the opinion of this court, must have been made *per incuriam*. What the judge meant was that the prosecution should show that the accused in fact knew that these were explosive substances. While thinking that there is no ground for this application, this court thinks that it is desirable to state what the law is on this subject.

In our view, in any prosecution under the Explosive Substances Act, 1883, s. 4, in the terms of this indictment, the prosecution has to prove that the accused was knowingly in possession of something which is an explosive substance within sect. 9 of the Act, and, further, that the possession was in circumstances giving rise to a reasonable suspicion that that possession was not for a lawful object. When so much is proved, A it rests on the accused to show, if he can, that he had the substance in his possession for a lawful object. It is not necessary for the prosecution to give evidence of, or to prove, knowledge by the accused of the explosive nature of the substance. No doubt evidence that the accused did or did not know or suspect what the substance might be, or to what use B it was intended to be put, would be material upon the question of the reasonableness or otherwise of the suspicion that the possession of the explosive substance by the accused was not for a lawful object. That is a very different thing, however, from saying that the prosecution must fail unless it proves some degree of chemical knowledge on the part C of the accused.

The gist of the offence created by sect. 4 of this Act is the wilful and intentional possession by an unauthorised person of that which is, in fact, an explosive substance in circumstances which, in the result, enable the jury to say that he had that explosive substance in his possession D for an unlawful object. Since that is the right interpretation of the section, there is no fear that any innocent person will ever be convicted of the offence so created by the Act, for, if an innocent person were unfortunate enough to find himself in possession of that which comes within the meaning of sect. 9 of the Act as an E explosive substance in circumstances which made it appear that there was a suspicion that he did not have it for a lawful object, nothing could be easier than for an innocent person to explain the purpose for which he had the explosive substance, and he would be bound to be acquitted. In our opinion, there was ample evidence to justify the jury in coming F to the verdict that the accused had the explosive substance for an unlawful object, and the application for leave to appeal against conviction is refused. With regard to the sentence, it is only necessary to say that the maximum sentence for this crime is 14 years' penal servitude, and 7 years' penal servitude was the sentence passed by the judge. In our G opinion, that was not in the least excessive, in the circumstances, and that application is also refused.

Application refused.

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

H

W. R. SIMMONS, LTD. v. MEEK.

[KING'S BENCH DIVISION (Oliver, J.), May 1, 1939.]

Guarantee—Severability of guarantee—Guarantee of payment of goods by debtor—No terms of credit agreed upon between debtor and seller of goods—Bills of exchange accepted by seller without knowledge of guarantor—Guarantor only partly discharged.

A

The defendant guaranteed the payment by the debtors of the purchase price of certain goods to be supplied by the plaintiffs to the debtors. No terms of credit were agreed upon between the plaintiffs and the debtors. Without the defendant's knowledge, the plaintiffs, contrary to previous practice, accepted from the debtors, in respect of part of the debt, bills of exchange for £150, which matured after periods of 4 months and 6 months respectively. At the time the bills were accepted, there was less than £150 due from the debtors. The plaintiffs sought to enforce the guarantee, and the defendants contended that, as the bills had been accepted by the plaintiffs without the defendant's knowledge, the defendant was released from the guarantee in its entirety. Against that, the plaintiffs contended that, if the defendant was released at all, he was released only in respect of the amount due when the bills were accepted, or at most for the amount represented by the bills:—

B

C

HELD: the guarantee was severable, and the defendant was released from the guarantee only in respect of the amount represented by the bills, but he was released for the full amount of the bills—namely, £150—although the actual debt at the time of acceptance was less.

D

[EDITORIAL NOTE.] Where a person has become surety for two things which are separate and distinct, a subsequent variation as to one only will not affect the liability in respect of the other. The real question here is, therefore, how far a general guarantee in respect of an unspecified series of transactions is severable and it is held to be so in so far as bills of exchange have been accepted in respect of the indebtedness of the principal debtor. Further, this is held to be so in respect of the whole amount secured by the bills although the principal was not, at the time when the bills were accepted, indebted to that amount.

E

AS TO PART VARIATION, see HALSBURY, Hailsham Edn., Vol. 16, p. 139, para. 165; and FOR CASES, see DIGEST, Vol. 26, p. 158, Nos. 1199, 1200.]

Cases referred to:

F

(1) *Croydon Gas Co. v. Dickinson* (1876), 2 C.P.D. 46; 26 Digest 158, 1200; 46 L.J.Q.B. 157; 36 L.T. 135.

(2) *Bingham v. Corbitt* (1864), 4 New Rep. 376; 26 Digest 184, 1411; 34 L.J.Q.B. 37.

(3) *Midland Motor Showrooms v. Newman*, [1929] 2 K.B. 256; Digest Supp.; 98 L.J.K.B. 490; 141 L.T. 230.

G

ACTION to enforce a guarantee for £184 15s. 11d. In respect of £150, bills had been accepted by the plaintiffs without the defendant's knowledge.

H. J. Astell Burt for the plaintiffs.

Gordon Alchin for the defendant.

H

OLIVER, J.: The facts in this case are that a business called James & Burrows, Ltd.—some kind of a builder's business, I gather, because it required timber—was turned into a limited company in July, 1937. At that time, the defendant—or, rather, the company for which the defendant was the accountant and a director—had been for some time in the habit of supplying James & Burrows, Ltd., with timber. I cannot

find any evidence that there were any particular terms of credit, or that there was any custom or any contract regulating the credit which was given. At the time of the registration of James & Burrows, Ltd., as a limited company, the present defendant entered into a contract of guarantee. It is in the form of a letter, dated July 16, 1937, addressed to Messrs. W. R. Simmons, Ltd., the plaintiffs in this action, and states as follows :

This business will in future be carried on by James & Burrows, Ltd. Pending completion of the necessary arrangements and until further notice we will be personally responsible for payment for all goods supplied by you to the new company and your present account for goods supplied to the trustee will be, similarly, paid in due course through the company.

That is a perfectly general guarantee. It makes the defendant responsible, if the debtors fail, for the price of the many goods supplied in the ordinary course of business to James & Burrows, Ltd. It is convenient to refer to them in this judgment as the debtors. Thereafter the practice of supplying goods on credit to the debtors by the plaintiffs continued. I have before me an account showing how, month by month, credit was given in varying amounts, and in what manner the accounts were paid off. Up to Mar., 1938, the payments were always apparently by cheque or by cash, but in Mar., 1938, two bills were given by the debtors and received by the plaintiffs for £50 each. The dates of the maturity of the bills were respectively July 18, 1938, and Sept. 18, 1938. The defendant had no notice whatever of those transactions, and I accept his evidence—although I do not accept all his evidence by any means—when he says that he had no knowledge of any such transactions at all. Later on, in July, 1938, one of those bills having been met—the other one was afterwards met—three more bills were accepted, each for £50, in exactly identical circumstances. Finding as I do that there was no custom and no agreement whatever between the parties, as between creditor and debtor, as to the terms of credit, I am obliged to find that the creditor was in the position of any other creditor who has not bound himself to give particular terms of credit. That is to say, he could have issued his writ immediately for goods sold and delivered. The position then was that, in those circumstances, and without the knowledge of the guarantor, he took the bills. The law of the matter is not in doubt, and I need not cite the authorities which have been cited to me, because it is accepted by counsel for the plaintiffs that, if time is given to a debtor by a creditor without the knowledge of a guarantor, the guarantor is to that extent discharged. I use the phrase “to that extent” for reasons which are apparent. The acceptance by the creditor of a bill is, without any question, upon the authorities, a contract to give time. The creditor cannot, after accepting bills of 3 months or 5 months, issue a writ at all until the bill is matured, and then he can sue upon the bill. In those circumstances, I must find that the creditor in this case, having a right to sue at once, divested himself of that right, and postponed that right by accepting bills from the debtors. That means, as I have said, to some

- extent at all events, that he has discharged the guarantor. To what extent has he so discharged him? Counsel for the defendant contended before me that the whole contract was gone. He said that one could not sever a contract of this kind. Counsel for the plaintiffs, on the other hand, said that one could sever it, and that it was really any number of different
- A contracts. It was a case in which month by month pressure was applied and so much paid off. The two main authorities cited to me on this question were *Croydon Gas Co. v. Dickinson* (1) and *Bingham v. Corbitt* (2), which are authorities for the severability of such contracts, as compared with the case cited by counsel for the defendant, *Midland*
- B *Motor Showrooms v. Newman* (3), where a contract which was suggested by counsel for the defendant to be similar to this, or at any rate comparable with this, was held not to be severable. The *Midland Motor Showrooms* case (3) was a case of a hire-purchase agreement with regard to a motor car. There was some complication there about an unknown
- C quantity of money which was spent on repairs which may tend to mitigate the position there a little. It was held, first by AVORY, J., and then by the Court of Appeal, that it was one contract, and not several contracts which could be severed. In *Croydon Gas Co. v. Dickinson* (1), the opposite view was expressed. It is enough for me to say that I
- D find this case much more comparable with the *Croydon Gas Co.* case (1) and *Bingham v. Corbitt* (2) than with *Midland Motor Showrooms v. Newman* (3). It seems to me that a hire-purchase contract for a motor car, the main stipulation of which is that a fixed sum shall be paid each month, is, on the face of it, a single contract, but a contract of this kind,
- E where an unknown amount of credit is to be given, and each month is to be paid off at times which are not stipulated, is much more comparable to a case where gas is being supplied, as in the *Croydon Gas Co.* case (1), in an unknown quantity each month. Accordingly, I find that the guarantor in this case, the defendant, is discharged only
- F in so far as the bills for £150—the last lot of bills—are concerned, and does not escape with regard to the remainder of the contract. What is the figure to be? The position, in so far as the facts are concerned, is that when the bills for £150 were given in July, a sum less than £150 was owing. What was being handed over was some £24 more than was due.
- G Assuming the bills were money, £24 was being provided in excess of that which was actually due. Counsel for the defendant says that, although, in those circumstances, £24 is given in credit, in respect of a transaction which has not taken place at the time when the bills were accepted, one must infer a contract to give time with regard to any-
- H thing which was then due, and also the next £24 which should become due. With reluctance, I think that that is right. There will be judgment accordingly.

Solicitors: *H. B. Wedlake, Saint & Co.* (for the plaintiffs); *Arthur E. Eves & Jones* (for the defendant).

[Reported by F. HONIG, ESQ., Barrister-at-Law.]

**NORTHUMBRIAN SHIPPING CO., LTD. v.
E. TIMM & SON, LTD.**

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Porter), **March 16, 17, May 9, 1939.**]

Shipping—Seaworthiness—Voyage in stages—Sufficiency of coal—Water Carriage of Goods Act, 1910 (R.S.C., 1927, c. 207), ss. 6, 7.

Under the Water Carriage of Goods Act, 1910 (Canada), s. 6, if the owner of any ship transporting merchandise from any port in Canada exercises due diligence to make the ship in all respects seaworthy, neither the ship nor the owner shall be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect. Under sect. 7, neither the ship nor the owner is liable for loss arising from dangers of the sea or other navigable waters. A shipowner had contracted to carry a cargo from Vancouver to Hull, and had arranged that his ship should call on the way at St. Thomas for the purpose of bunkering. The quantity of coal normally required by the ship for the voyage to St. Thomas was 650 tons, and the ship left Vancouver with 675 tons on board. A few days after passing through the Panama Canal, the captain realised that he had not sufficient coal to reach St. Thomas, and accordingly altered course for Jamaica. While proceeding there, he struck a reef, and his vessel and cargo became a total loss. The cargo owners claimed damages, and the shipowner contended that (a) the ship on leaving Vancouver had sufficient coal and a proper margin to take her to St. Thomas, and (b) there was a potential coaling port at Colon, and this fact must be regarded in fixing the margin :—

HELD : as the ship had no sufficient margin of coal for possible contingencies when she started on her voyage from Vancouver to St. Thomas, she was not seaworthy, and due diligence was not exercised to make her so. The stages of the voyage must be determined before sailing, and the fact that it was negligence on the part of the master of the ship not to elect to call at an intermediate port will not make the ship seaworthy at the beginning of her voyage.

Per LORD WRIGHT : I do not see how due diligence can be exercised if it is uncertain what is to be the next coaling port.

Order of Court of Appeal ([1938] 1 All E.R. 774) affirmed.

[EDITORIAL NOTE.] When a voyage is divided into stages, the vessel must then be seaworthy at the commencement of each stage. Thus, a vessel which has liberty to call at a particular intermediate port to coal, if she is to be seaworthy after passing that port and not calling there, must have had sufficient coal on passing that port to carry her to the next port of call. The present case considers in detail the seaworthiness of a ship from the point of view of carrying sufficient bunkers.

AS TO VOYAGE IN STAGES, see HALSBURY, Hailsham Edn., Vol. 30, pp. 468, 469, para. 625 ; and FOR CASES, see DIGEST, Vol. 41, p. 475, Nos. 3064-3074.]

Cases referred to :

- (1) *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538 ; Digest Supp. ; 103 L.J.P.C. 166 ; 151 L.T. 549.
- (2) *Kish v. Taylor*, [1912] A.C. 604 ; 41 Digest 485, 3170 ; 81 L.J.K.B. 1027 ; 106 L.T. 900.
- (3) *Thin v. Richards & Co.*, [1892] 2 Q.B. 141 ; 41 Digest 475, 3072 ; 62 L.J.Q.B. 39 ; 66 L.T. 584.
- (4) *The Vortigern*, [1899] P. 140 ; 29 Digest 192, 1517 ; 68 L.J.P. 49 ; 80 L.T. 382.
- (5) *McIver & Co., Ltd. v. Tate Steamers, Ltd.*, [1903] 1 K.B. 362 ; 41 Digest 477, 3098 ; 72 L.J.K.B. 253 ; 88 L.T. 182.

- (6) *Greenock S.S. Co. v. Maritime Insurance Co.*, [1903] 2 K.B. 657; 29 Digest 192, 1518; 72 L.J.K.B. 868; 89 L.T. 200.
- (7) *McFadden v. Blue Star Line*, [1905] 1 K.B. 697; 41 Digest 445, 2796; 74 L.J.K.B. 423; 93 L.T. 52.
- (8) *Bouillon v. Lupton* (1863), 15 C.B.N.S. 113; 29 Digest 192, 1515; 33 L.J.C.P. 37; 8 L.T. 575.
- A (9) *Biccard v. Shepherd* (1861), 14 Moo.P.C.C. 471; 29 Digest 191, 1510; *sub nom. Commercial Marine Co. v. Namaqua Mining Co.*, 5 L.T. 504.

APPEAL from an order of the Court of Appeal (GREER, SLESSER and CLAUSON, L.JJ.), dated Mar. 2, 1938, and reported [1938] 1 All E.R. 774, affirming a judgment of MACKINNON, L.J., sitting as an additional judge of the King's Bench Division, dated Apr. 29, 1937, and reported [1937] 2 All E.R. 847, in favour of the respondents, E. Timm & Son, Ltd. The facts and the arguments are set out in the opinions of LORD WRIGHT and LORD PORTER.

- H. U. Willink, K.C., and Cyril Miller for the appellants.
- C A. T. Miller, K.C., Sir Robert Aske, K.C., and A. J. Hodgson for the respondents.

D LORD ATKIN: My Lords, I have had the opportunity of reading the opinions which are about to be delivered by my noble and learned friends LORD WRIGHT and LORD PORTER. I agree with them, and I have nothing to add.

LORD THANKERTON: My Lords, I also have had an opportunity of considering the opinions about to be delivered by my two noble and learned friends, and I concur in their view.

E LORD WRIGHT: My Lords, the material facts in this case were carefully and precisely found by MACKINNON, L.J., who tried the action when sitting as an additional judge of the King's Bench Division. His findings of fact were affirmed by the Court of Appeal, and have been F accepted before your Lordships on this Appeal. They can therefore be stated shortly.

The respondents were holders of a bill of lading for a parcel of 9,520 bushels of wheat shipped in Nov., 1932, at Vancouver, British Columbia, on the appellants' steamship Newbrough for carriage to Hull. The G vessel's total cargo consisted of 8,389 tons of wheat and bran. In the events which ensued, that whole cargo, which was worth about £40,000, became a total loss. It has been agreed that the result of these proceedings will be binding as between the shipowners and the other bill of lading holders. The Newbrough had sailed round from Montreal to Vancouver H in ballast, and the appellants had instructed the master to bunker on the way at Port Royal, Jamaica, taking in sufficient coals to sail with 1,200 tons. This was done. At Vancouver, the master was instructed to bunker for the ocean voyage homewards at St. Thomas, in the Virgin Islands. This, as MACKINNON, L.J., found, fixed the stage of the voyage for bunkering purposes. At the trial, MACKINNON, L.J., found, after

considering a great deal of conflicting evidence, that, when the Newbrough left Vancouver on Nov. 26, 1932, she had on board no more than 675 tons of coal, and that this quantity was not sufficient to take her from Vancouver to St. Thomas. Her voyage took her down the Pacific coast and then through the Panama Canal. There was nothing abnormal in the weather in the Pacific for a winter voyage. While passing through the Canal, the master asked the chief engineer what quantity of coal remained on board, and was told that there was about 168 tons. This appears to have been an overestimate of about 12 tons. However, it is not now contested that, as MACKINNON, L.J., found, the master should have taken more bunkers at Colon, the port at the Atlantic end of the Canal, where there are bunkering facilities, before proceeding towards St. Thomas. It is not questioned that he had authority from his owners to do so if he deemed it necessary. He did not do so, and left the Canal on Dec. 19, 1932. On Dec. 22, he decided that he had not enough bunkers to take him to St. Thomas, which was about 530 miles away, and altered course to Port Royal, then about 415 miles away. There had been no unusual weather for the time of the year in the Caribbean Sea. While on this course, the vessel ran on to Morant Cays, a reef off the island of Jamaica, and became, along with her cargo, a total loss. MACKINNON, L.J., found that the vessel was lost by default or errors in navigation. He also found that, on starting from Vancouver, the vessel had not enough coal to take her to St. Thomas, allowing a reasonable margin for the contingencies to which any such voyage must be subject, and that the master had not exercised due diligence to make her seaworthy.

The bill of lading under which the respondents' wheat was carried was issued at Vancouver on Nov. 26, 1932. It was to be governed by the law of the carrying ship—that is, by English law—and contained elaborate stipulations and exceptions, but these were in the main superseded by cl. 35. This clause, which is generally called the clause paramount, provided that the bill of lading was subject to all the terms and provisions of, and exemptions from liability contained in, the Canadian Water Carriage of Goods Act, 1910, which was then in force, and incorporated, as required by that Act, sect. 4, which declared to be null and void any clause, covenant or agreement in any bill of lading relieving the shipowner, charterer, master or agent from liability for damage arising from negligence or weakening or avoiding the obligations of the owner or charterer to exercise due diligence in regard to seaworthiness or the obligations of the master, officers, servants or agents to care for and deliver the goods, unless such clause, covenant or agreement was in accordance with the Act. In this way, as a matter of contract, the relevant exceptions contained in the Act were incorporated in the bill of lading. Of these provisions, those in sect. 6 were the only ones relied on by the appellants. This section, so far as material, is to the effect that, if the owners of any ship transporting merchandise from any port in Canada

should exercise due diligence to make the ship in all respects seaworthy and properly supplied, the owner should not be responsible for loss resulting from faults or errors in navigation of the ship. The appellants rightly, for obvious reasons, did not seek to found a defence on sect. 7. Sect. 6 was considered by the Privy Council in *Paterson Steamships, Ltd. v.*

A *Canadian Co-operative Wheat Producers, Ltd.* (1), where it was said, at pp. 546, 547 :

What is important to note in sect. 6 is that the protection is conditional on the owner having exercised due diligence to make the ship seaworthy. At common law seaworthiness of the ship in a contract of sea carriage has, if necessary, to be shown to have existed at the commencement of the voyage, but unseaworthiness involves

B no liability on the shipowner unless it has caused the damage complained of : *Kish v. Taylor* (2) ; but the obligation to provide a seaworthy ship is absolute, and is not limited to due diligence to make it so. The matter which sect. 6 deals with as the condition on which its privileges may be relied on is not seaworthiness, but due diligence to make the ship seaworthy : if, however, that condition is not fulfilled, the shipowner cannot, under sect. 6, excuse himself from liability for loss due to negligence in the respects specified in the section.

C In the present case, as already stated, at the trial *MAC KINNON, L.J.*, held that the stranding of the *Newbrough* on *Morant Cays* was caused by the negligence of the master and the navigating officers, and thus resulted from faults or errors in navigation. Whether the appellants could successfully rely on sect. 6 depended on whether they could show

D that they exercised due diligence to make the vessel seaworthy, and thus fulfilled the condition imposed by the section. This issue turned solely on the sufficiency of the bunkers on leaving *Vancouver*. As already stated, *MAC KINNON, L.J.*, held that they had not fulfilled the condition. The obligation to make a ship seaworthy is personal to the owners,

E whether or not they entrust the performance of that obligation to experts, servants or agents. They cannot say that there was a miscalculation merely due to the negligence of their servants. They were in this case responsible for deciding that the vessel should bunker at *St. Thomas* on her way from *Vancouver*, and were bound to see that she had sufficient

F coal. *Prima facie*, the findings of fact of *MAC KINNON, L.J.*, would seem to dispose of the case, but there has been raised on behalf of the appellants a more subtle contention, involving a refinement of the doctrine of stages of the voyage as applied in regard to bunkering on a long voyage. This doctrine of stages has not been the subject of direct decision in this

G House, but has been laid down or recognised by the Court of Appeal in *Thin v. Richards & Co.* (3), *The Vortigern* (4), *McIver & Co., Ltd. v. Tate Steamers, Ltd.* (5) and *Greenock S.S. Co. v. Maritime Insurance Co.* (6), where the rule was applied in the case of a voyage policy of marine insurance. It is a special application to bunker supply, of a doctrine

H which has been applied in other connections, such as a stage of the voyage for loading in port, or for passages in inland waters, where different standards of fitness are required as compared with what is required in the open sea. The application of the doctrine of stages became particularly important when vessels came to depend for their propulsion on machinery, the fuel for which was necessarily consumed as the voyage

went on. The rule which has been established is that a steamship or motor vessel starting from her port on a long ocean voyage need not carry enough coal (or oil or other fuel) for the whole voyage, but only sufficient to take her to a particular convenient or usual bunkering port on the way. That is treated as a section of the voyage, and is called A a stage of the voyage. Thus the warranty of seaworthiness is subdivided in respect of bunkers. Instead of a single obligation to make the vessel seaworthy in this respect, which must be satisfied once for all at the commencement of the voyage, there is substituted a recurring obligation at each bunkering port at which the owners, or those who act for the B owners, decide she shall bunker, thereby fixing the particular stage of the voyage. The principle presupposes that the contract of affreightment permits of this course, and of deviating, if necessary, for this purpose. It has been said that this rule is a concession to the shipowners, but I prefer to say (with COLLINS, L.J., in *The Vortigern* (4), at p. 159) C that it is rather an adjustment of the requirements as to this type of seaworthiness to the commercial necessities of the case. If a steamship starting, for instance, from London for Australia had to start with enough coal or fuel to carry her to Australia, the amount she would have to carry on starting would reduce her cargo-carrying capacity to such D an extent as to make the adventure uneconomic. Not only would the shipowners suffer, but so would the shippers and the community generally, because of the high or prohibitive freights which would have to be charged.

As usually understood, however, the doctrine of stages would not in E this case help the shipowners, on the finding of MACKINNON, L.J., that there was a failure of due diligence in sending the ship from Vancouver with insufficient coal for the bunkering stage which they had fixed at St. Thomas. The refinement which the appellants seek to introduce depends on a proposition of law which MACKINNON, L.J., and the Court F of Appeal have rejected—namely, that, though a steamer has not in fact a sufficient margin of bunkers to satisfy the normal contingencies of the stage which the owners have fixed, yet, if a reasonably sufficient margin has been allowed, the fact that there turns out to be an actual G deficiency will not necessitate a finding that the vessel was unseaworthy for the stage, or that due diligence has not been used to make her so, provided that there is in the course of the stage an intermediate bunkering port at which in case of need the vessel can call. The quantity of bunkers which, apart from this qualification, would be necessary for the stage is then, it is said, to be modified by taking into account this optional H facility. Thus, it is argued, the vessel starts in a seaworthy condition in respect of bunkers, and, if she is likely to run short on the way, because of conditions of the voyage being rather worse than expected, though not abnormal, she can make good the defect by calling at the intermediate bunkering port. If she fails to do so, the failure is not, it is said, a breach of the warranty of seaworthiness, which has been satisfied

- once for all for that stage when she started upon it, but is merely a fault or error in navigation, for which the owners can claim the protection of sect. 6 of the Act, or of similar exception clauses under other forms of contract. As to the facts of this particular case, the appellants point out that the Newbrough on a previous winter voyage from
- A Vancouver to St. Thomas had consumed 602 tons of coal, which was substantially less than what MACKINNON, L.J., found she had when she started from Vancouver on this voyage, and also that the failure to take more coal at Colon was due to the miscalculation of the engineer, who gave the master a wrong figure when the master, on the passage
- B through the Canal, inquired what coal was left in the bunkers, and that all this constituted a case of negligence, not unseaworthiness. The appellants alleged that, having regard to the possibility of bunkering at Colon, the Newbrough should be held as a matter of law to have been sufficiently supplied with bunkers when she left Vancouver, or at least
- C that due diligence had been exercised to make her so. In support of this view of the law, they relied on the language of GORELL BARNES, J., in *The Vortigern* (4), at p. 147. In that case, the *Vortigern* was on a voyage from Cebu to Liverpool. The first stage of the voyage was to Colombo, where she coaled. The next coaling port fixed by the owners
- D was Suez. She ran short of coal in the Red Sea. In proceeding down the Red Sea, she passed Perim and Aden, and might have put into either port to coal, but she did not. GORELL BARNES, J., held that she was unseaworthy on leaving Colombo, because she had not sufficient coal for the stage to Suez, and held that it was immaterial to consider
- E what happened afterwards, when she passed Perim. He went on to say, however, at p. 147, that, if it were not a breach of warranty for the vessel to start with insufficient coal to reach the next port at which she was intended to coal, provided there were another coaling port which she would pass on the way, and could have in reserve to go into if necessary,
- F then as the owners must treat the voyage as divided into two stages from Colombo to Port Said instead of one, the vessel must be made seaworthy on leaving Perim :

- The vessel must be seaworthy for the whole stage, or made seaworthy for each division of the stage, and she was not seaworthy for the portion of the voyage on which the loss occurred.
- G

- Thus there is a dilemma. To apply this reasoning to the facts of the present case, either the stage was from Vancouver to St. Thomas, in which event the steamer was not seaworthy on leaving Vancouver, or the stage was from Vancouver to Colon, in which case the new stage
- H started from Colon, and was to St. Thomas from Colon, and the steamer was not seaworthy on that stage. The dilemma thus appears to be unavoidable.

In *The Vortigern* (4), GORELL BARNES, J., said that he preferred the former alternative, and added, at p. 147 :

If the captain determines to start, as in this case, from Colombo to Suez, that is

the stage which was fixed upon, and if the vessel has not enough coal for that stage I do not think the owners are relieved from the obligation thus incurred by setting up negligence in not putting into a port on the way to get coal if they are found to fall short in the transit from Colombo to Suez.

These observations by a great master of mercantile law meet with my complete assent, and may be applied with even greater force in the present case. It is true that under sect. 6 of the Canadian Act the question is not whether the unseaworthiness caused the loss, as it was in *The Vortigern* (4). There is no question here of the absolute warranty of seaworthiness. It is a question of the more limited obligation of due diligence. Nevertheless, the condition of claiming the exemption depended on establishing that due diligence had been exercised to make the ship seaworthy. I do not see how due diligence can be exercised if it is uncertain what is to be the next coaling port. There may be several alternative or optional possible coaling ports on the way, and I do not see how there can be a standard of what is a sufficient bunker supply unless it is determined what the stage of the voyage is. This must be done before sailing, because it is then that the obligation, whether it is the absolute obligation or the obligation of due diligence, must be satisfied.

I can find no suggestion that the master ever contemplated that he was sailing from Vancouver on any stage of the voyage except to St. Thomas, which was the next coaling port fixed by the owners. It is true that the master had authority, if coal were proving insufficient, to replenish the bunkers at Colon, as he thought of doing when in the Canal, but, in my opinion, the stage must be determined when the vessel sails. Seaworthiness is no doubt relative to the nature of the adventure and the other circumstances of the case, but, unless it is determined on sailing what the stage of the voyage is, it is impossible to say whether the ship is seaworthy or not. This might have serious consequences on the insurances. There is also the special difficulty under sect. 6 that a vessel might be lost by negligent navigation soon after sailing from her first port with insufficient bunkers. Like GORELL BARNES, J., I prefer what he called the former alternative—namely, that the intention on sailing definitely fixes the stage, and that the availability *en route* of what might be called an optional bunkering port cannot be taken into account. I think that this is true, not only in general, but also where it may be said that it is only a question of estimating the margin for contingencies. If the stage is determined, the quantity of bunkers sufficient to make the vessel seaworthy for that stage must be determined in view of all contingencies that a prudent shipowner ought to contemplate.

The appellants' argument seems to be that the bunkers are to be deemed to be sufficient for the stage if, though in fact insufficient, they might have appeared to be reasonably sufficient, having regard to reasonable contingencies. If, however, the estimate is not adequate, and the margin proves in fact insufficient, the vessel is still to be held

seaworthy for the stage, because she can fill up on the way. I find such a view most difficult. The way of looking at the matter in this connection most favourable to the shipowners is that there may be what may be called a conditional seaworthiness. Though the bunkers are insufficient for the stage, as MAC KINNON, L.J., held that they were

A in this case, yet they become sufficient when the condition is fulfilled and they are replenished at the intermediate coaling station before harm can ensue. If the condition is fulfilled, seaworthiness, it is said, is actually, or at least retrospectively, secured. If, however, in the case supposed, the vessel is lost by negligent navigation soon after leaving

B the first port, and the court finds that she was not sufficiently bunkered for the stage, whether because there was an insufficient margin for contingencies or for any other reason, how can it be said that the defect was immaterial simply because she might have bunkered at the intermediate port and made good the initial deficiency? It is, however,

C not necessary here to consider these questions, because the vessel did not in fact take coal at Colon, so that, if it be right to talk of a conditional seaworthiness, the condition was not fulfilled, and the original unseaworthiness was unadeemed. It is not here necessary finally either to reject or to accept the view which GORELL BARNES, J., mentioned but

D did not prefer, and which the Court of Appeal in *The Vortigern* (4) did not even mention, because on either view the appellants must fail here, as MAC KINNON, L.J., and the Court of Appeal unanimously held. If they have to rely on conditional seaworthiness, the condition was not fulfilled.

E I merely add a few words out of respect to an argument addressed to us on behalf of the appellants that to reject their contention—which, as at present advised, I am prepared to do—would be unduly to burden shipowners, who would be held bound to fulfil excessive requirements in the way of bunkers. Commercial law has always been ready, so

F far as possible, to sacrifice pedantic logical consistency in favour of convenience in the conduct of business, but I am not pressed by the suggested hardship or embarrassment. Owners, with the help of their masters and other agents acting for them, have full discretion to fix any reasonable stages for the voyage. It would involve grave difficulties

G in practice if the stage of the voyage were not definitely fixed on sailing, so that the standard of sufficiency in respect of bunkers was rendered vague and uncertain. In my opinion, the appeal should be dismissed with costs.

H LORD PORTER: My Lords, the appellants are the owners of the Newbrough, and the respondents are the indorsees of certain bills of lading issued by the appellants in respect of a parcel of Canadian wheat, part of a cargo which she carried. The action was brought by the respondents for non-delivery of the parcel, which was totally lost through the stranding of the Newbrough on Morant Cays, a reef in the

Caribbean Sea, south of Jamaica. She had sailed on a voyage from Swansea to Montreal, and the captain was there instructed by the appellants to proceed to Vancouver in ballast and to bunker *en route* at Port Royal, taking in sufficient coal at that port to sail with 1,200 tons. After coaling as directed, the Newbrough cleared for Vancouver, and arrived there on Nov. 24, 1932. At Vancouver, she shipped a cargo of Canadian wheat, and set out on her return voyage to Hull, without having taken on board any further bunkers. Before sailing, however, the captain was instructed by the appellants to replenish his coal at St. Thomas in the Virgin Islands on the homeward voyage. He had, according to his own account, also received authority to call at Colon, if necessary, and to coal there. A

The cargo was carried under bills of lading signed by the master containing a large number of provisions, of which only two need be mentioned. The first is cl. 2, which may be sufficiently described by saying that it gives a wide permission to deviate. The second is cl. 35, which provides as follows : C

This bill of lading is subject to all the terms and provisions of and exemptions from liability contained in the Canadian Water Carriage of Goods Act, 1910, and the following section is incorporated in this bill of lading as required by the said Act.

Where any bill of lading or similar document of title to goods contains any clause, covenant or agreement whereby, (a) the owner, charterer, master or agent of any ship, or the ship itself, is relieved from liability for loss or damage to goods arising from negligence, fault, or failure in the proper loading, stowage, custody, care or delivery of goods received by them or any of them to be carried in or by the ship ; or (b) any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip, and supply the ship and make and keep the ship seaworthy, and make and keep the ship's hold, refrigerator and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise lessened, weakened or avoided ; or (c) the obligations of the masters, officers, agents or servants of any ship to carefully handle and stow goods, and to care for, preserve and properly deliver them, are in any wise lessened, weakened or avoided, such clause, covenant or agreement shall be illegal, null and void, and of no effect, unless such clause, covenant or agreement is in accordance with the other provisions of this Act. D
E

Sect. 6 of the Canadian Act referred to—omitting immaterial words—provides as follows : F

If the owner of any ship transporting merchandise . . . from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner . . . shall become or be held responsible for loss . . . resulting from faults or errors in navigation . . . of the ship . . . G

It was found by the court of first instance, and admitted in argument before us, that the cargo was lost owing to the stranding of the ship, and that that stranding was due to the negligent navigation of her master. If, then, the owners had exercised due diligence to make the ship seaworthy, they would be excused for a loss suffered owing to the negligence of her officers, but, in order to claim that protection, they must show that the condition of seaworthiness was fulfilled : *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.* (1), at p. 548. The question argued in the courts below and before your Lordships was whether that condition had in fact been complied with. H

Prima facie, a ship must be seaworthy on sailing from her starting point for the whole voyage upon which she is engaged, but it has long been established that the voyage may be divided into stages, and that it is sufficient if she be satisfactorily equipped for each stage at its commencement. The principle is older than the age of steam. It has
 A been held to apply to such stages as lying in harbour (*McFadden v. Blue Star Line* (7)), proceeding down a river (*Bouillon v. Lupton* (8)), and passing from one port to another (*Biccard v. Shepherd* (9)). The doctrine was, however, of less importance in the days when vessels proceeded under sail. Once steam propulsion was adopted, and bunkers
 B had to be carried, it became important for the shipowner that he should not be compelled to carry so large a quantity of bunkers as to compel him unduly to diminish his cargo, or even to force him to avoid certain voyages altogether. Indeed, it is true to say that the principle had also some importance for the cargo owner, since by it more cargo could
 C be carried, and freight was cheapened. Whatever its origin, the doctrine of stages is now well established, and it is immaterial to consider whether it is a concession granted to the shipowner or a provision for the mutual advantage of the carrier and cargo owner. However, though the voyage may be divided into stages and the obligation of the shipowner confined
 D to providing the proper equipment for each of those stages at its beginning, the force of the obligation has not been diminished. It may well be that the shipowner has the right to predetermine what those stages shall be—at any rate, provided he chooses usual and reasonable stages. Once chosen, however, they are those for which the necessary equipment
 E must be furnished.

It was conceded on behalf of the appellant that, if the voyage from Vancouver to St. Thomas was alone to be considered, and if the possibility of coaling at other ports on that stage were excluded, the Newbrough had insufficient coal, in the sense that no sufficient margin for possible
 F contingencies had been shipped. It is indeed possible that, on the figures found by the judge, she was insufficiently equipped for that stage, even though the possibility of coaling at an intermediate port were taken into consideration, but your Lordships have not considered the evidence on that part of the case, and, for the purpose of this decision, I accept
 G the view that in the latter case a sufficient margin of coal had been shipped. It was, however, contended on behalf of the appellant that, in equipping a vessel for a stage between two ports where it is possible to call and take in bunkers at an intermediate port, the same margin of safety is not required as in a case in which a ship sails from one port
 H to another with no possibility of coaling in between. In either case, the appellant agreed that the sole question for the court to consider was whether, at the beginning of the stage, the ship had sufficient bunkers on board for a voyage between the two ports, but, it was said, that sufficiency must be measured by a different standard, in a case where she could replenish her fuel in the course of the stage, from that

required where such replenishment was impossible. In argument, the proposition was stated thus :

The quantity is reasonably sufficient if it consists of the quantity reasonably anticipated as the quantity that will be used plus a reasonable margin for contingencies. In fixing the margin for contingencies, however, the shipowner is bound to take into account any weather or other adverse conditions with which, in the ordinary course, he may meet, but is entitled also to take into account, at any rate where his contract gives him liberty to call at intermediate ports, the existence of bunker facilities *en route* which will be available in the event of adverse conditions reducing his margin to an unsatisfactory level. A

In the present case, as I have indicated, there was a wide deviation clause, and liberty was thereby given to call at intermediate ports, amongst which Colon would be included. The question, therefore, can be narrowed to an inquiry whether the obligation as to the amount of the bunkers required for a stage differs according to whether there are opportunities of bunkering at a usual coaling port on the route, or whether there are no such opportunities because the stage is one where no such coaling port exists. In the present case, the owners of the Newbrough chose as their first stage on the homeward voyage that from Vancouver to St. Thomas. It was imperative, therefore, that the ship should be seaworthy at Vancouver, the beginning of the stage. Seaworthiness, however, is a term of art, and means, in relation to bunkering—as, indeed, the wording of the Canadian Act shows—that the ship must have a sufficient supply of coal, including a proper margin for contingencies, to take her over the whole of her route between the ports constituting that stage. If that be the obligation, the Newbrough was admittedly insufficiently supplied. Indeed, to assert otherwise is merely to say that, though she had not enough to cover all necessary contingencies for the stage, yet she had enough for the more usual eventualities, and an opportunity of making up her deficiencies *en route* in case the less usual, but still not improbable, contingencies should occur. It may be that the owners, in taking the lesser quantity, were running no more than a reasonable risk in a case where the coal supplied might well prove sufficient, and, if it did not, their master could take a further supply at an intermediate port, but the question is not whether a reasonable risk has been taken, but whether the owners have exercised due diligence to make their ship in all respects seaworthy and properly supplied. Their duty is to use due diligence to supply the ship with coal, and that duty is not performed by providing what may prove to be insufficient unless the master takes an additional quantity at some intermediate port in case of need. They may have supplied sufficient bunkers if all goes well. If not, they have delegated to their master a duty which the law imposes upon them, and must trust to him to perform it. If he does not, they are answerable for the breach of an obligation which it was their duty to fulfil. B C D E F G H

The argument involves the proposition—as, indeed, the appellants recognised—that a failure of the master to make good the deficiency would not make the ship unseaworthy, but would only be an instance

- of negligence on the part of her officers. To accept such a contention, however, would indeed be to decrease the liabilities of a shipowner by excusing him for a failure to perform his obligations on the ground that he had entrusted them to his servants and those servants had been negligent. If the argument were to prevail, I see no reason why a shipowner should not claim that, though his ship had insufficient bunkers at the beginning of a voyage or a stage, yet he had done all that was necessary, since he had instructed his master to take an ample supply of bunkers on sailing, and had supplied him with enough money to pay for them. On the other hand, to maintain that the ship was or was not seaworthy according to whether the master bunkered or failed to bunker *en route* would involve the possibility of her becoming unseaworthy at some place on the voyage, and at a time which it would be difficult to define. Would it be when the master determined to take no more coal, or when he reached and passed the intermediate port without calling? Or must one regard the ship as unseaworthy from the beginning of the stage? With this doubt in mind, how is it to be known when her insurances became ineffective, or when the protection afforded by the terms of her bills of lading ceased to operate? If the moment when she might have coaled at the latest available intermediate port be taken, she would become unseaworthy as from a port at which she did not bunker, and at which she might not even have called. Such a state of things was no doubt envisaged by GORELL BARNES, J., in *The Vortigern* (4), at p. 147, but he preferred to rest his decision on the ground that the vessel was unseaworthy from the beginning of the stage. Moreover, even if the contention were to be adopted, it would not avail the appellants in the present case, since, if Colon is to be regarded as the beginning of a stage, she was conceded to be unseaworthy then. Indeed, the argument on behalf of the appellants recognised and maintained that the vessel's seaworthiness must not be judged by the amount of bunkers she had at Colon.

- In whatever way, however, one looks at the circumstances, the appellants seem to be placed in a dilemma. If the master elects not to avail himself of the intermediate port, he but confirms the stage which the owners had previously arranged, and, if, at the beginning of that stage, the ship was unseaworthy, she remained unseaworthy until she reached, or failed to reach, the appointed port. If, on the other hand, he does avail himself of the opportunity of bunkering at the intermediate port, he elects to make that part of the voyage in two stages, and the vessel must be seaworthy when she leaves the intermediate port. It is not enough to say that a prudent man would proceed on the longer stage trusting to fill up with bunkers at an intermediate port if necessary. No doubt the opportunity of replenishing her bunkers exists, but a failure to perform the warranty of seaworthiness cannot be excused by trusting to the discretion of the master, and, if he fails to act prudently, laying the blame on him. The fact that it was negligence in the

captain or some other officer of the ship not to elect to call at the intermediate port will not make the ship seaworthy at the beginning of her voyage. This view accords with that expressed in *Thin v. Richards & Co.* (3), *The Vortigern* (4) and *Greenock S.S. Co. v. Maritime Insurance Co.* (6). With these cases I agree, and I do not find it necessary—as GORELL BARNES, J., did not find it necessary in *The Vortigern* (4)—to determine whether or not any consideration of seaworthiness at the intermediate port was material. The Newbrough was not seaworthy when she started on that stage of her voyage which lay between Vancouver and St. Thomas, and due diligence was not exercised to make her so. I would dismiss the appeal. A

LORD ATKIN: My Lords, I am asked by my noble and learned friend LORD RUSSELL OF KILLOWEN to say that he agrees with the opinions which have been expressed. B

Appeal dismissed with costs. C

Solicitors: *Middleton, Lewis & Clarke*, agents for *Middleton & Co.*, Sunderland (for the appellants); *Clyde & Co.* (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.] D

LONDON COUNTY COUNCIL v. IPSWICH COUNTY BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), April 27, 28, 1939.] E

Lucacy—Mental defective—Certified while in a general hospital—Place of residence immediately before admission to certified institution—Whether general hospital “place of residence immediately before”—Liability for maintenance—Mental Deficiency Act, 1913 (c. 28), ss. 43 (1), 71—Mental Deficiency Act, 1927 (c. 33), s. 9.

On June 10, 1938, a girl who had been living in St. Pancras Hospital in the county of London from Nov. 24, 1937, was found to be feeble-minded, and was sent to a certified institution by a judicial authority who specified the county borough of Ipswich as her place of residence and the respondents as the responsible authority for her maintenance under the Mental Deficiency Act, 1913, s. 43, because the girl resided in the respondents' borough before Nov. 24, 1937, when she was removed to St. Pancras Hospital, following upon an order of removal to the county of London, being her last place of legal settlement by virtue of her residence there with an irremovable parent. A magistrate granted an application made by the respondents to have the liability transferred to the appellants, who thereupon brought this appeal:— F

HELD: (i) upon a proper construction of sect. 9 of the Act of 1927, the words “or other public or charitable institution” were decidedly general, and meant “any other public or charitable institution,” and not “or other public or state or certified institution,” as the *ejusdem generis* rule was inapplicable. St. Pancras Hospital could not, therefore, be regarded as a “place of residence” within the meaning of the section. G

(ii) on the facts, it could not be said that St. Pancras Hospital was determined to have been the defective's place of residence within the H

meaning of sect. 9, because the order for her removal to the county of London was not "for the purposes of or in connection with" her reception into St. Pancras Hospital within the meaning of sect. 9, but only determined her last place of legal settlement, and not her place of residence.

A [EDITORIAL NOTE. This case is concerned only with the proper construction of the Mental Deficiency Act, 1927, s. 9. The place of residence of a defective is to be determined, not by the situation of the institution of which she has been an inmate, but by that of the place where she resided prior to her removal to such institution.

B AS TO DETERMINATION OF RESIDENCE OF DEFECTIVE, see HALSBURY, Hailsham Edn., Vol. 21, pp. 499, 500, para. 912; and FOR CASES, see DIGEST, Vol. 33, pp. 272, 273, Nos. 1901-1903.]

Case referred to:

(1) *Worcestershire County Council v. Warwickshire County Council*, [1934] 2 K.B. 288; Digest Supp.; 103 L.J.K.B. 460; 151 L.T. 378.

C APPEAL by way of case stated from a decision of one of the magistrates of the police court of the Metropolis being a court of summary jurisdiction under the Mental Deficiency Act, 1913, s. 44, sitting at Tower Bridge police court. The facts and the arguments are fully set out in the judgment of LORD HEWART, L.C.J.

R. Moehwyn Hughes for the appellants.

D *Arthur Capewell* for the respondents.

E LORD HEWART, L.C.J.: In this case, an application was made to the effect that on June 10, 1938, an order had been made by Mr. Sterndale Scarr, a justice for the county of London specially appointed under the Lunacy Act, 1890, directing that one Hilda Jessie Mannall, a defective, should be sent to a certified institution, specifying the county borough of Ipswich as the place in which she resided and claiming that the liability of the council of the county borough of Ipswich should be transferred to the council of the county of London, who are the appellants here. That application was heard in Sept., 1938, and the magistrate adjudged that Hilda Jessie Mannall was resident in the county of London and that the liability of the respondents be transferred to the appellants and ordered the appellants to repay to the respondents, who are the Ipswich County Borough Council, all expenses incurred by the respondents in respect of

F Hilda Jessie Mannall, and also to pay certain costs. The appellants, the London County Council, were dissatisfied with that finding, and accordingly requested the magistrate to state a case. This case has accordingly been stated, and the question for us is whether or not the magistrate came to a correct determination in point of law.

H The material facts can be very briefly recapitulated. Hilda Jessie Mannall was born in Sept., 1917, at Eltham, in south-east London, and there she resided with her father until a day in Apr., 1937. Her father died in Apr., 1937, and shortly before his death he was employed as a barman in Eltham. Her mother had been removed in 1929 to a mental hospital in Epsom. The only other member of the family was a young brother who was employed in London. Accordingly at the beginning

of Apr., 1937, Mr. Mannall's sister—that is to say, the aunt of this girl—Mrs. Jessie Godfrey, a widow living in Ipswich, went to London, where she found Hilda Jessie Mannall and her brother with no one to look after them. She remained in London for some little time, and returned to Ipswich on Apr. 8, 1937, and, inasmuch as Hilda Jessie Mannall would otherwise have been left friendless and penniless, she took her back with her while the question of her future welfare was being decided. A

Afterwards, in June, 1937, Mrs. Godfrey sent Hilda Jessie Mannall to another aunt in West Suffolk, but that plan was not successful, and on or about Sept. 23, 1937, Hilda Jessie Mannall returned to her aunt in Ipswich. On Oct. 2, 1937, the aunt reported the case to the public assistance department of the respondents, and applied to them for assistance in respect of maintenance. The district medical officer, in accordance with the ordinary routine, saw the girl on Oct. 2, and certified her as fit to undergo training as a domestic servant. On Oct. 7, 1937, the public assistance department of the respondents began to allow the aunt 12s. 6d. per week in respect of the maintenance of her niece, and that continued until the niece was afterwards removed from Ipswich. B C

On Oct. 18, 1937, on the application of the chief officer of the public assistance department of the respondents, an order was made by two justices for the removal of this girl as a poor person to the county of London, that being, as the case finds, the place of her last legal settlement by virtue of her residence with an irremovable parent in Eltham. On Nov. 12, 1937, the chief officer of the public assistance department of the respondents wrote to the public assistance department of the appellants with reference to the chargeability of this girl, and said that the aunt had reported to the relieving officer her inability to accommodate the girl any longer and suggested that the girl, being subnormal, would be better provided for in a home where she could be specially treated, asking, in those circumstances, for the name and address of the appropriate institution to which the case should be removed. On Nov. 15, 1937, the chief officer of the public assistance department of the appellants replied that she should be removed to St. Pancras (South) Hospital, St. Pancras Road, London, N.W. The case finds that the St. Pancras Hospital is a general hospital maintained by the appellants under the Public Health (London) Act, 1936. That removal accordingly took place on Nov. 24, 1937. Afterwards, on Dec. 23, 1937, the chief officer of the mental hospitals department of the appellants notified the town clerk of the respondents that Hilda Jessie Mannall had been examined by the appellants' medical officer of health and was deemed to be feeble-minded within the meaning of the Mental Deficiency Acts, and asked that the respondents would arrange for a petition to be presented for an order sending her to a certified institution. On Jan. 4, 1938, after inquiries made, the town clerk of the respondents replied that the respondents did not see their way to agree that Hilda Jessie Mannall was a defective for whose maintenance they were responsible. The chief officer of the mental hospitals department D E F G H

of the appellants replied that he intended to arrange for a petition to be presented for an order sending Hilda Jessie Mannall to a certified institution, and in that letter he specified the respondents as the responsible authority. On May 31, 1938, the appellants informed the respondents that a petition would be presented to a judicial authority in London on

A June 10, 1938. That petition was presented. The respondents opposed the contention that they were the responsible authority, but nevertheless the order was made by Mr. Sterndale Scarr, a justice for the county of London under the Lunacy Act, 1930, sending Hilda Jessie Mannall, who was then still residing at the St. Pancras Hospital, to a farm colony at

B Hildenborough in Kent, a certified institution, and that order specified the county borough of Ipswich as her place of residence for the purposes of the Mental Deficiency Acts, 1913-1927.

On behalf of the appellants, before the stipendiary magistrate it was contended that St. Pancras Hospital was a "public institution"

C within the meaning of the Mental Deficiency Act, 1927, s. 9, and that Hilda Jessie Mannall was a person who required medical observation as a potential mental defective. Mr. Moelwyn Hughes contended that the order of removal did not determine the residence of Hilda Jessie Mannall for the purpose of sect. 9, and that the respondents were responsible for

D providing accommodation for Hilda Jessie Mannall. The magistrate, who has set out his reasons very clearly in his judgment, decided against the London County Council. He adjudged that Hilda Jessie Mannall, a defective, who on June 10, 1938, was ordered to be sent to a certified institution—the county borough of Ipswich being specified in the order

E as the place in which she resided—was resident in the county of London, and that the liability of the respondents was accordingly transferred to the appellants, and there followed a consequential order about repayment and costs. The fact, therefore, which is made quite plain is that, while this girl was at St. Pancras Hospital, she was adjudged to be feeble-

F minded, and was ordered to be sent to an institution, Ipswich being named as the place of her residence.

The matter turns upon the provisions of the statutes of 1913 and 1927, and I need not re-read the passages which have been very fully laid before us. The Mental Deficiency Act, 1913, s. 43 (1), provides as follows :

G Where a person is ordered to be sent to a certified institution or to be placed under guardianship, the local authority responsible for providing accommodation for that person or making provision for his guardianship, as the case may be, shall be the council of the county or county borough in which he resided (to be specified in the order), and the duties of that council shall include [the duty to provide a conveyance to and reception and maintenance at the institution].

H By the Mental Deficiency Act, 1927, s. 9, sect. 44 of the Act of 1913 was amended by the insertion of a new subsection, which, for the purposes of this case, is not merely of some importance, but is of great importance. The new subsection provides as follows :

Where the order is made by a judicial authority and is in respect of a person in an institution for lunatics, certified institution, approved home, or other public or

charitable institution, that person shall, for the purposes of the provisions of the last foregoing section [sect. 43 of the Act of 1913] be deemed to have resided in the place which was his place of residence immediately before he was received into the institution or home, and if for the purposes of or in connection with his reception into the institution or home any place was determined to have been his place of residence, that determination shall be conclusive.

The argument which was made to the stipendiary magistrate, and made with success, was that in that amended subsection or that additional subsection the words "or other public or charitable institution" must be construed as being *ejusdem generis* with the words which have gone before—namely, "an institution for lunatics, certified institution, approved home, or other public or charitable institution." The argument was that the St. Pancras Hospital was not a "public or charitable institution" within the meaning of those words, and that argument has been presented, and forcibly presented, before us by Mr. Capewell. In my opinion, that argument, with all due respect to those who are responsible for it, ignores the clear contents of this statutory provision. I think that the words "or other public or charitable institution" are designedly general. They follow upon more specific words—namely, "an institution for lunatics, certified institution, approved home." It is after those words that the general words are added: "or other public or charitable institution." I think that those words mean: "or any other public or charitable institution."

It was argued by Mr. Capewell that that view cannot be correct, by reason of the provisions of the Mental Deficiency Act, 1913, s. 71, which is the interpretation section, and it is quite true that in sect. 71 one finds the following words:

... the expressions "institution" and "institution for defectives" mean a state institution or certified institution.

That, however, was a definition in an Act of Parliament passed in 1913, and even so the definition section begins with the saving words: "Unless the context otherwise requires." The argument which is seriously presented is that, nevertheless, notwithstanding the lapse of time from 1913 to 1927, notwithstanding the deliberate amendment or alteration of the law brought about by the Mental Deficiency Act, 1927, s. 9, the word "institution" must be defined as it was defined in 1913, and that the words "unless the context otherwise requires" must be merely ignored. When it appears that this amending section is dated 1927 and employs the expression "or other public or charitable institution" as the climax or conclusion of an enumeration of words beginning "an institution for lunatics, certified institution, approved home," it seems to me that it is impossible to contend that the limited definition of the expression "institution" is to be read into the section in the later enactment. If one were to read it in that way, and, conforming to that view, were to re-write that part of sect. 44 as expanded by the provisions of sect. 9 of the Act of 1927, one would have to read words like these: "Where the order is made by a judicial authority and is in respect of a

person in an institution for lunatics, certified institution, approved home, or other public or charitable certified institution." I should have thought that that would be a clear example of surplusage or tautology, and I think that these words—"or other public or charitable institution"—mean exactly what they say. The test is not what is the nature or

A the origin of the institution. The test which has to be satisfied is whether or not it is a public or charitable institution, and that the St. Pancras Hospital is an institution of that kind is not, I think, seriously disputed.

Our attention was directed (and directed, curiously enough, in the course of the argument made on the part of these respondents) to
 B *Worcestershire County Council v. Warwickshire County Council* (1). I was a member of that court, and on that occasion, with AVORY and TALBOT, JJ., I delivered a judgment. I cannot find anything in any of those judgments which lends colour or support to the argument which has been adduced on behalf of these respondents. The judgments in
 C that case do undoubtedly lay stress, with some reiteration, on the paramount importance of residence from the point of view of this legislation, but nothing, as far as I can see, lends the slightest colour to the ingenious argument which Mr. Capewell has put forward. Indeed, it was, one may think, partly at least because of the clearness with which residence has,
 D since then, come to be recognised as the test that this later Act adopted and acted upon the view that it was only fair to cut out any period which might have been passed by the patient in a public or charitable institution. Accordingly, the section provides that, where the order is made by a judicial authority in respect of a person in a public or charitable institution, then
 E that person shall be deemed to have resided in the place which was his place of residence immediately before, and not after, he is received into the institution or home. The Act, in my opinion, seems clearly to have contemplated a case of the nature of that which we are now considering.

F Mr. Capewell, by a kind of addition or postscript to his very careful argument, directed our attention to the closing words of the new sect. 44 :

... and if for the purposes of or in connection with his reception into the institution or home any place was determined to have been his place of residence, that determination shall be conclusive.

G With all due respect, I think that the suggested argument fails, because it was not "for the purposes of or in connection with" reception into the St. Pancras Hospital that any determination with regard to the place of residence could be said to have been made. Such decision as had been antecedently arrived at was *alio intuitu*, and had nothing to do with
 H such a matter as that to which the closing words of that section refer. In these circumstances, it seems to me that the interpretation which the stipendiary was invited to put, and did put, upon these words in the amended sect. 44 of the Act of 1913 was not a correct interpretation. I think, therefore, that this appeal ought to be allowed, with all the consequences which the allowing of the appeal necessarily involves.

HUMPHREYS, J. : Upon the main point raised in this case—namely, the proper interpretation of the words “other public or charitable institution” to be found in the Mental Deficiency Act, 1927, s. 9—I agree entirely with the judgment of my Lord, and I have nothing to add for my own part. There was, however, an argument addressed to the magistrate as stated in the case which he describes as an ingenious argument, and with regard to which he said that it was not necessary for him to decide the matter, but, should there be an appeal, it could then be dealt with if the court thought fit to do so, and Mr. Capewell has been permitted by the court to raise that question. The point in question is this. The last words of sect. 9 provide as follows :

... and if for the purposes of or in connection with his reception into the institution or home any place was determined to have been his place of residence, that determination shall be conclusive.

Mr. Capewell argued that there had been in this case, in connection with or for the purposes of this girl's reception into St. Pancras Hospital, a determination that her residence was or had been her place of residence in London, and that that was conclusive.

At first sight, the argument seemed to me to be not only ingenious but formidable. I think the answer to it depends really upon the facts of this case. It appears from para. 4 (8) of the case that, at a time when the girl was in fact living in Ipswich, owing to the aunt with whom she was living becoming a person who had to be assisted from the public funds—in fact, on Oct. 18, 1937—an order was made on the application of the chief officer of the public assistance department of the respondents to this appeal, who are the Ipswich County Borough Council, for the removal of this girl from Ipswich to the county of London, that being the place, as was found, of her last legal settlement, by virtue of her residence with a parent who was irremovable from London at an address in London. No appeal being lodged against that order of removal, it stands, for the purposes for which it was made, final and conclusive. It may be (and I think it unnecessary to express any opinion about it) that that was a determination as to the place of residence of the girl herself. I am disposed to think that it was, although it was based upon the irremovability of her parent, with whom she was in fact residing. However, the facts of the case seem to me to establish that it was neither for the purposes of, nor in connection with, her reception into the St. Pancras Hospital that that determination was either asked for or arrived at. In truth, it was upon a totally different matter, and for a totally different purpose, that that order of removal was made, and, the order having been made on Oct. 18, it was not in fact until Nov. 24 that the girl entered the St. Pancras Hospital. I think, therefore, that, on the facts of this case, without my expressing any further opinion upon the last part of sect. 9 of the Act of 1927, it is not shown that there was any determination as to the place of residence of this girl for the purposes of, or in connection with, her reception into the St. Pancras Hospital, and

that, therefore, those last words do not apply. I therefore agree with the result proposed by my Lord.

- SINGLETON, J. : On May 31, 1938, a petition was presented in respect of this defective. That petition was heard on June 10, 1938, by a judicial authority, and an order was made that the defective should be removed
- A to Princess Christian's Farm Colony, Hildenborough, Kent, specifying the county borough of Ipswich as her place of residence for the purpose of the Mental Deficiency Acts, 1913-1927. It was necessary that that should be specified in the order, by reason of sect. 43 (1) of the Act of 1913. The county borough of Ipswich were aggrieved, or complained
- B that they were aggrieved, and under sect. 44 (3) they took proceedings to have a determination by the court. The magistrate in this case upset that order which had been made upon the petition, and decided that in law the responsible party was the London County Council. In my view, in so doing he took too narrow a view of the words "other
- C public or charitable institution" in sect. 9 of the Act of 1927. He ought to have held that the hospital in London was an "other public or charitable institution" within the meaning of that section, and ought not to have counted the time spent there. In other words, he should have applied the words :
- D . . . be deemed to have resided in the place which was his place of residence immediately before he was received into the institution or home. . .
- In that event, the finding based upon the petition would have been upheld.

- There is one other matter to which reference has been made. Mr.
- E Capewell relied upon a finding in para. 4 (8) of the case that the last legal settlement of the defective, by virtue of her residence through an irremovable status of the parent, was within the county of London, and he argued that, there having been no appeal against that order, that determined the matter, because of the concluding words of the amending
- F section :

- . . . if for the purposes of or in connection with his reception into the institution or home any place was determined to have been his place of residence, that determination shall be conclusive.
- I am satisfied, after having heard the argument, that, though it may well be that an effort has been made from time to time to bring the responsibility for the maintenance of a mental defective on to the same basis as
- G that of the responsibility for the maintenance of a pauper, it does occur sometimes that that object is not achieved. In the present case, there has been a determination only of the settlement of the mental defective. There was not, until the order of June 10, 1938, any determination of
- H residence for the purpose of the Mental Deficiency Acts, 1913-1927. I agree that this appeal should be allowed.

Appeal allowed with costs.

Solicitors : J. R. Howard Roberts (for the appellants); Sharpe, Pritchard & Co., agents for A. Moffat, Town Clerk, Ipswich (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and du Parcq,
 L.JJ.), April 20, 21, May 5, 1939.]

Companies—Winding up—Dissolution—Transfer of property, rights and liabilities to another company—Contract of personal service—Companies Act, 1929 (c. 23), s. 154. A

Master and Servant—Written contract of personal service—Dissolution of employer company and transfer of property, rights and liabilities to another company—Whether contract of service between employee and transferee company—Companies Act, 1929 (c. 23), s. 154.

In Jan., 1937, the appellant entered into a written contract of service with a colliery company to serve the company as a coal-miner at their colliery. No notice to terminate the contract was ever given to or by the appellant, and the appellant did not enter thereafter into any written contract of service with any other person or company. On June 4, 1937, an order was made under the Companies Act, 1929, s. 154, transferring to the respondent company the property, rights and liabilities of the colliery company, which was dissolved under sect. 153 of the Act. The order was duly published as directed by the court, but did not in fact come to the notice of the appellant. The appellant duly worked at the colliery until Oct. 7, 1937, and received his wages, which were paid weekly by the respondent company as from June 4, 1937. On Oct. 7, 1937, the appellant absented himself without cause from his work at the colliery, and the respondent company sustained a loss of not less than 15s. in consequence thereof. The appellant was charged, under the Employers and Workmen Act, 1875, s. 4, with having wrongfully absented himself from, or neglected, the service of the respondent company, who claimed the sum of 15s. for damages for breach of contract. Between the date of the issue of the summons and the day of the hearing before the justices, the appellant continued to work for, and receive wages from, the respondent company. The justices found that there had been a breach of contract, and ordered the appellant to pay the damages claimed and costs. Thereupon this appeal was brought, and the appellant contended, *inter alia*, that no contract of service existed between him and the respondent company, and that the order of the court of June 4, 1937, could not, and did not, effect a transfer of a contract of personal service, which was by law incapable of assignment :— B C D E

HELD : the words of the Companies Act, 1929, s. 154, are wide enough to cover a contract of service, and the only way in which a transfer can be made in such a case is by substituting the transferee company as the employer. F

Decision of the Divisional Court ([1938] 4 All E.R. 6) affirmed.

[EDITORIAL NOTE. It is a general rule that contracts of personal service contemplate that the person employed has been selected with reference to his individual skill, competency or other qualification, and it is therefore of the essence of the contract that the contracting party is entitled to personal performance, and, in default thereof, is entitled to treat the contract as at an end. By reason of this rule, it has been said that contracts of personal service are not assignable, but it is here held that it is possible for the assignment of contracts of personal service to be included in a general assignment of all the property of a company about to be dissolved to a new company formed for the purpose of taking over the business of that company. G H

AS TO ASSIGNABILITY OF CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 308-310, para. 431; and FOR CASES, see DIGEST, Vol. 12, pp. 592, 593, Nos. 4930-4933.]

Cases referred to :

- (1) *Arthur v. Bokenham* (1708), 11 Mod. Rep. 148.
- (2) *Escott v. Mastin* (1842), 4 Moo. P.C.C. 104; 42 Digest 708, 1256; *affg.* (1841), 2 Curt. 692.
- (3) *Leach v. R.*, [1912] A.C. 305; 42 Digest 708, 1251; *sub nom. Leach v. Public Prosecutions Director*, 81 L.J.K.B. 616; 106 L.T. 281; *revsg. S.C. sub nom. R. v. Acaster, R. v. Leach*, [1912] 1 K.B. 488.
- (4) *Eldon (Lord) v. Hedley Bros.*, [1935] 2 K.B. 1; Digest Supp.; 104 L.J.K.B. 334; 152 L.T. 507.
- (5) *R. v. Morris* (1867), L.R. 1 C.C.R. 90; 42 Digest 709, 1262; 36 L.J.M.C. 84; 16 L.T. 636.
- (6) *Beckham v. Drake* (1849), 2 H.L. Cas. 579; 5 Digest 971, 7955; *affg.* (1843), 11 M. & W. 315.
- (7) *Bailey v. Thurston & Co., Ltd.*, [1903] 1 K.B. 137; 5 Digest 935, 7643; 72 L.J.K.B. 36; 88 L.T. 43.
- (8) *Kemp v. Baerselman*, [1906] 2 K.B. 604; 12 Digest 589, 4908; 75 L.J.K.B. 873.
- (9) *British Waggon Co. v. Lea* (1880), 5 Q.B.D. 149; 12 Digest 589, 4911; 49 L.J.Q.B. 321; 42 L.T. 437.
- (10) *Tolhurst v. Associated Portland Cement Manufacturers (1900), Associated Portland Cement Manufacturers (1900) v. Tolhurst*, [1902] 2 K.B. 660; 8 Digest 424, 29; 71 L.J.K.B. 949; 87 L.T. 465; *affd.* on other grounds, [1903] A.C. 414.

D APPEAL from an order of the Divisional Court, dated Oct. 13, 1938, and reported [1938] 4 All E.R. 6, dismissing an appeal by way of case stated against a decision of the justices for the county of York. The point at issue was whether or not the words of the Companies Act, 1929, ss. 153, 154, which make provision for the passing of the property and the rights of constituent companies to an amalgamated company, when the amalgamation takes place under an order of the court, include the assignment of a contract of personal service, since the sections contain general words only and there are no special words relating to such a contract.

F *Hon. Sir Stafford Cripps, K.C., G. W. Wrangham and Angus L. Macmillan* for the appellant.

Cyril J. Radcliffe, K.C., and H. B. H. Hylton-Foster for the respondents.

Cripps, K.C.: Contracts of personal services are not specially mentioned in the Companies Act, 1929, s. 154. The appellant has sworn on oath that up to Oct. 7, 1937, he believed himself to be working for the Hickleton Main Colliery Co., Ltd. Apart from any statutory provisions, there is no power to assign a contract in the performance of which there is some personal element. That is a well-established rule of the common law. The principle to be applied in the interpretation of the statute, in the circumstances, is that Parliament is not to be understood, by the use of general words, to be setting aside an established rule of the common law. There are numerous Acts in which Parliament has used express words to show that it intended contracts of personal services to be transferred. If one looks at the cases which refer to reverses of the common law rules by the use of general

words, it will be seen that they are very strong : *Arthur v. Bokenham* (1) and *Escott v. Mastin* (2). Where there are general words which may be interpreted in either of two ways, they must not be interpreted so as to negative the common law unless there is a clear indication that it is so intended. There is nothing in this part of the Act dealing with personal services, and the words of the section are apt to cover what is mentioned. Therefore, it cannot be taken to be that, by the mere affirmative words employed, the legislature intended to negative a rule of the common law which is well established : *Leach v. R.* (3). In *Eldon (Lord) v. Hedley Bros.* (4), SLESSER, L.J., quoted BYLES, J., in *R. v. Morris* (5), where the judge said that it was a sound rule to construe a statute in conformity with the common law rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law. In the present case, it is impossible to say that the words of the section are plainly intended to alter the rule of the common law. *Beckham v. Drake* (6) is similar to the present case. A case under the more modern Bankruptcy Act is *Bailey v. Thurston & Co., Ltd.* (7), where it was held that the principle laid down in *Beckham v. Drake* (6) applied and that, until the trustee intervened, the debtor could bring the action. The law on assignment of contracts is stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 7, p. 308. Contracts which, on their true construction, have to be performed by the particular contracting parties do not pass under the statute, in the absence of a perfectly clear intention expressed in the statute. Rights and liabilities under any contract involving personal skill, whether or not it is a contract of personal services, do not pass under an order made under sect. 154. A statute should be interpreted in accordance with the common law, unless an intention to abrogate the common law is expressed in it. All that the court can do under sect. 154 (1) is to make an order dealing with the other matters. There is nothing to show that the legislature intended substituted performance of a contract of service. It is very significant that in the Local Government Act, 1929, the Railways Act, 1921, and the London Passenger Transport Act, 1933, special provisions were inserted for the transfer of services. In none of these Acts was the provision for the transfer of the staff made in general terms. [Counsel referred to *Kemp v. Baerselman* (8) and *British Waggon Co. v. Lea* (9).]

Radcliffe, K.C. : The argument which has been addressed to the court on behalf of the appellant has been on the basis that a certain principle of the common law was to be preserved in the interpretation of the Companies Act, 1929, s. 154. It is impossible for any court to do other than give to that section an operation which cuts right through the common law principle applicable to the properties of this company in respect of the matters mentioned in the section. According to the statute, the properties of the constituent companies pass by virtue of the order. At common law, no liability under a contract can pass

from the person who is bound by it, and become the liability of another person, without the consent of the person enjoying the benefit of that liability. In the present case, by virtue of what Parliament has said, by virtue of the order of the court, the liability of one company is transferred to, and becomes the liability of, another company. The company

A which was originally bound disappears without a winding up. If Parliament had not transferred the liability, the appellant would have had no person bound to him by contract at all. There is no provision at all for these matters in the common law. At common law, the benefit of a contract was incapable of assignment, but it may now be assigned by

B reason of statute. When one looks at sects. 153 and 154, there can be no doubt as to what has been provided and as to the reason why those provisions have been made. It was said for the appellant that by the common law a servant cannot be transferred from one master to another. A man's right to be employed by a limited liability company is only a

C right to be employed by a name. He cannot prevent any change either of the directors or of the shareholders. He cannot prevent a change in the management. The legal principle remains, no doubt, but the substance of it ceased by reason of the introduction of limited liability companies as employers, instead of individuals. It is not to be wondered

D at that, when Parliament was dealing with the question of the reconstruction of a company, it thought it a matter of complete unimportance to the person contracting with it, as the reality of the business remains exactly as it was before, and the change is merely technical. The idea behind the reconstruction is that the company is the same as it was

E before, although it is amplified by merger. Sect. 154 includes rights of every description. If the right to give employment, and the obligation to pay for it, vest, the right to call for services should vest also. If one has to employ a man, he must be under an obligation to work. *British Waggon Co. v. Lea* (9) is the classic case of a person being held able to

F perform his part of the contract by the hand of another. In *Tolhurst v. Associated Portland Cement Manufacturers (1900)* (10), the whole matter is summarised by SIR RICHARD HENN COLLINS, M.R. With regard to the statutes referred to on behalf of the appellant, the words of LORD HEWART, L.C.J., are a complete answer. The fact remains

G that, if it is once admitted that, by virtue of the order made under sect. 154, the liability passed, it follows of necessity that the benefit which is correlative to the liability has passed also.

Cripps, K.C., in reply : There is no record on the statute book of an Act where Parliament has purported to pass a contract of service from one person to another without using express words. There is no case where Parliament has effected an amalgamation without some form of compensation being associated with the compulsion of the employees to change their employers. That is important when sect. 154 is being considered, as it is said, for the respondent company, that the change has been made without the use of express words. The argument of inconvenience has

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been used, but the difficulties are quite imaginary. The position of a man with a long-term contract is the same as the position of an ordinary workman. A company puts it out of its power to perform a contract by amalgamating with another company, and, if a company terminates a contract which it has running for a definite period of time, the company commits a breach of contract. Sect. 154 does not deal with employers and employees at all. It may be that the word "liability" covers cases of accrued liability, but the problem of employer and employee is not dealt with. A

SIR WILFRID GREENE, M.R. [delivering the judgment of the court]: B
 This is an appeal from an order of a Divisional Court of the King's Bench Division dismissing with costs the appeal of the appellant Nokes from an order of the petty sessions holden at Doncaster. The claim of the respondent company was for the sum of 15s. for damages for breach of contract, and was based upon an allegation that the appellant had, on a day stated, wrongfully absented himself from, or neglected, the service of the respondents at their Hickleton Colliery. By the order of the petty sessions the appellant was ordered to pay the sum of 15s. claimed, and 10s. costs. C

The facts are set out in the stated case, and we need not repeat them. D
 The only question which was discussed before us was the effect of the order of the Chancery Division made under the Companies Act, 1929, s. 154. The basic arguments upon this question may be shortly summarised in the following way. On behalf of the appellant, it was said that sect. 154 does not empower the court to make an order transferring to the transferee company upon an amalgamation the benefit of a contract of service between the transferor company and a person employed by it, and that, accordingly, the order of the Chancery Division, in so far as it purports to direct such a transfer, is one which the court had no power to make. On behalf of the respondents, it was said that the section empowers the court to direct such a transfer, and that, as the result of the order, the respondents were substituted as contracting parties with the appellant for the Hickleton Main Colliery Co., with whom the contract of service was originally made. It is not disputed by the appellant that, if sect. 154 confers power on the court to direct such a transfer, that power was exercised by the order now in question. E
 Accordingly, the matter for determination resolves itself into a question of the true construction of the section. F

Sect. 154 was first introduced into the Company Code by the Companies Act, 1929. Its operation is confined to cases where an application is made under sect. 153 for sanctioning a compromise or arrangement proposed for the purposes of, or in connection with, a scheme for reconstruction or amalgamation. It does not, however, apply to every kind of reconstruction or amalgamation scheme, but only to those where there is to be a transfer in whole or in part of the undertaking or property of G
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one company to another company, and it is for the court to decide what the appropriate order should be in any particular case. The jurisdiction conferred upon the court is described in wide and comprehensive language. Before the enactment of the section, such transfers as it contemplates could only be carried into effect by means of agreements and assignments, and in the common case the transferor company was of necessity put into liquidation. The complication and expense to which this state of affairs often gave rise were well-known, and it is apparent that, as LORD HEWART, L.C.J., in his judgment observes, at p. 10 :

It does not need the help of the marginal note to perceive that we are dealing with provisions for facilitating . . . the reconstruction and amalgamation of companies . . .

The court is empowered to provide, by subsect. (1) (a), for the transfer to the transferee company of "the whole or any part of the undertaking and of the property or liabilities of any transferor company" and, by (d), for the dissolution, without winding up, of any transferor company. Subsect. (2) provides that, by virtue of the order, property directed to be transferred shall be transferred to, and vest in, the transferee company, and liabilities directed to be transferred shall be transferred to, and become the liabilities of, that company. By subsect. (4), the expression "property" is declared to include property, rights and powers of every description, and the expression "liabilities" includes duties. This language is *prima facie* wide enough to include within its scope every kind of right recognised by law, including proprietary, contractual or statutory rights of every description. Similarly, liabilities of every description—and, in particular, contractual liabilities—are *prima facie* included. What is there to justify a restricted interpretation of these words, so as to exclude certain kinds of contractual rights and liabilities? In the general purpose of the section, nothing. On the contrary, if the power of the court did not extend to contractual rights and liabilities of all kinds, its order would be only partial in its operation, and the necessary arrangements for transfer in such cases would have to be carried through by assignment, novation or other appropriate means. How, in such a case, the beneficent power of ordering dissolution of a transferor company without liquidation could conveniently be exercised it is difficult to see.

The main argument of counsel for the appellant was to the effect that the wide language of the section must be construed so as to exclude an operation inconsistent with a fundamental rule of common law. This rule, he said, was a rule which regarded as incapable of assignment, not merely contracts of personal service such as that here in question, but also all contracts in which the personal qualities of a contracting party were concerned. He admitted that, in order to bring the former class of contract within the principle which he asserted, he was logically compelled to include the latter class also. The result of this argument, if it were accepted, would be remarkable and unfortunate, for the transferee company would start its career without taking over a single employee

of the transferor company, and without obtaining the benefit, or submitting to the burden, of the other excluded contracts. The position of the other parties to the excluded contracts would be equally unfortunate, since, by the dissolution of the transferor company, their remedy against it, if any, would have disappeared, and all that they could do (and even their right to do this is by no means clear) would be to sue the transferee company for breach of the contract by repudiation on the part of the transferor company—if, indeed, any such breach could, in the circumstances, be attributed to that company, a question upon which we express no opinion. In truth, however, the foundation upon which the argument is based will not bear examination. The effect of an order made under the section will inevitably run counter to rules of common law. To take two cases only, the assignment of the benefit of contracts and the transfer of liabilities under such contracts as admittedly fall within the section—for instance, contracts for the sale of goods—were alike impossible at common law, and even since the Judicature Act the assignment (strictly so called) of liability under a contract cannot be effected. A B C

Counsel for the appellant endeavoured to reinforce his argument with regard to contracts of personal service by asserting that the result of its rejection must be to attribute to the legislature an intention to treat employees as mere slaves to be transferred from one master to another without their consent. This is the language of hyperbole, and does not, in our opinion, advance the argument. As counsel for the respondents justly observed, the employee of a limited company is always liable to suffer a complete change in the individuals within a company with whom he has to deal. Every shareholder, every director, every manager who was there when he entered employment may be changed next day and he cannot complain. Moreover, in the limited class of reconstructions and amalgamations with which the section deals, there is of necessity an element of continuity present. We are unable to see in the suggested mischief anything to justify a restricted construction of the clear words of the section. The point is particularly illusory in the case of employees whose service is terminable by short notice. D E F

A more attractive argument was to the following effect. Under a contract of service, it was said, the employee agrees to render services to the employer, and to no one else, and the employer agrees to accept and remunerate services rendered by the employee to him, and to no one else. Accordingly, it was said, the result of substituting the transferee company for the transferor company as the employer would be, not to transfer to the transferee company the benefit and burden of the contract of service, but to bring a new contract of service into existence, different in its terms from the original contract, in that the employee would thereafter be bound to serve the transferee company, whereas his contract was to serve the transferor company, and no one else. In our opinion, this argument places too rigid and technical an interpretation G H

upon the language of the section. The right to the services of an employee is the property of the transferor company, the liability to remunerate the employee is a liability of the transferor company, and all rights and liabilities are transferred. The language, therefore, as has already been pointed out, is wide enough to cover the case of a contract of service, and the only way in which a "transfer" can be made in such a case is by substituting the transferee company as employer. The word "transfer" is not a word of art. If this were not the correct construction of the section, the result would be that contracts of this description would be discharged every time an order was made for the dissolution of the transferor company under subsect. (1) (b), and the employee would be left to pursue a doubtful claim in damages against the transferee company, a matter to which we have already referred.

Reference was also made to certain Acts of Parliament containing special provisions for the transfer of employees, such as the London Passenger Transport Act, 1933. We do not find any guidance in these provisions, since the Acts in which they appear relate to transfers of a different type, in regard to which the legislature deemed it desirable to insert special terms. We agree with the decision of the Divisional Court, and the appeal must be dismissed with costs.

Solicitors: *Hosking & Berkeley*, agents for *J. W. Fenoughty, Dunn & Co.*, Rotherham (for the appellants); *Bird & Bird*, agents for *Gichard & Co.*, Rotherham (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

SINFRA AKTIENGESSELLSCHAFT v. SINFRA, LTD.

[KING'S BENCH DIVISION (Lewis, J.), **April 18, 19, 20, 21, 24, 25, 26, 27, 28, May 5, 1939.**]

Conflict of Laws—Power of attorney—Formation of power governed by foreign law—Operation of power to take place in England—English law applicable. Agency—Power of attorney—Power not coupled with an interest—Revocability of power.

In 1935, the plaintiffs engaged W. with a view to procuring finance for, and marketing, their patents in a number of foreign countries. It was found as a fact that, upon the construction of certain documents, including a power of attorney, according to foreign law, W. had power to bind the plaintiffs as against third parties, of whom the defendants were one. In 1937, the plaintiffs, by certain correspondence, purported to revoke W.'s power of attorney. Thereafter, the defendants, acting upon the instructions of W., expended a sum of money which, they alleged, was expended on the plaintiffs' behalf, their contention being that W.'s power of attorney was irrevocable, and therefore could not be validly revoked by the plaintiffs. Against that, the plaintiffs contended that, as W.'s power of attorney had been revoked, the money had been expended without their consent, and that, consequently, it was recoverable as money had and received by the defendants to the use of the plaintiffs. The power of attorney, although its formation was governed by foreign law, was intended to operate in England, and two questions

arose—namely, (i) whether W.'s authority was governed by English law, and (ii) whether it was an authority coupled with an interest, and, as such, irrevocable :—

HELD : (i) as W.'s authority was to operate in England, it was governed by English law.

(ii) according to English law, the authority was not one coupled with an interest, and, as such, was revocable, and, as the plaintiffs had validly revoked the authority, they were entitled to recover.

[EDITORIAL NOTE.] The substantial point in this case is the decision that a power of attorney, prepared and executed abroad to operate in England, is to be construed as to its operation according to English law. It may be that foreign law has to be considered as to its form and execution, but, as to its operation, the law applicable is that of the country in which it is to be used. Included in the operation of the power is the question whether it was revocable. The suggestion was that it was irrevocable, as being a power coupled with an interest.

AS TO THE LAW APPLICABLE TO POWERS OF ATTORNEY, see HALSBURY, Hailsham Edn., Vol. 6, pp. 263, 264, para. 321; and FOR CASE, see DIGEST, Vol. 1, p. 296, No. 246.]

Cases referred to :

- (1) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79; 17 Digest 331, 1424; 60 L.J.Q.B. 295; 63 L.T. 739.
- (2) *Clerk v. Laurie* (1857), 2 H. & N. 199; 1 Digest 689, 2985; 26 L.J.Ex. 317; 29 L.T.O.S. 203.
- (3) *Re Hannan's Empress Gold Mining & Development Co., Carmichael's Case*, [1896] 2 Ch. 643; 1 Digest 696, 3040; 65 L.J.Ch. 902; 75 L.T. 45.
- (4) *Smart v. Sandars* (1848), 5 C.B. 895; 1 Digest 696, 3042; 17 L.J.C.P. 258; 11 L.T.O.S. 178.
- (5) *Walsh v. Whitcomb* (1797), 2 Esp. 565; 1 Digest 688, 2970.

ACTION for money had and received by the defendants to the use of the plaintiffs. The plaintiffs claimed a sum of £611 10s. 11d. as money had and received, and on Sept. 17, 1937, they had recovered summary judgment for £478 16s. 3d. In a counterclaim, the balance of £132 14s. 8d. was claimed by the defendants as money expended by them on behalf of the plaintiffs on the instructions of Wronker-Flatow. It was contended by the defendants that Wronker-Flatow was, at the time when that money was expended, the duly authorised attorney of the plaintiffs under an irrevocable power of attorney. The plaintiffs contended that the power of attorney was a revocable one and, at the material time, had been duly revoked.

Gerald A. Gardiner and *Walter Gumbel* for the plaintiffs.

L. N. Pritt, K.C., and *A. H. Glenn Craske* for the defendants.

LEWIS, J. : The plaintiffs, a company incorporated and existing under Swiss law, claim from the defendants, an English company, the sum of £132 14s. 8d., being the balance of a sum of £611 10s. 11d. moneys had and received by the defendants to the use of the plaintiffs. After action brought, the plaintiffs recovered judgment for £478 16s. 3d. on Sept. 17, 1937, a stay being put upon that judgment pending the trial of the counterclaim in this action. The defendants say, with regard to this balance, that it was properly expended by them on behalf of the

plaintiffs on the instructions of one Wronker-Flatow, the duly authorised agent and attorney of the plaintiffs. The authority of Mr. Wronker-Flatow is stated to be contained in a written agreement, dated Dec. 19, 1935, referred to as the Washington agreement, a document dated Jan. 14, 1936, which sets out the Washington agreement and verifies it, signed by the director of the plaintiff company, Dr. Suter, and a document referred to as the power of attorney, dated Feb. 10, 1936, made in Switzerland. The plaintiffs admit these documents, but do not agree with the construction put upon them by the defendants. Moreover, they say that the authority, of whatever nature and extent, given by those documents, or either of them, was revoked before the money had and received by the defendants to their use was expended—namely, by telegrams of Mar. 20, 1937, and Mar. 23, 1937—and that notice of this revocation was conveyed to the defendants by letter dated Mar. 22, 1937. The defendants admit these telegrams and this letter, and admit that the letter purported to cancel all and every authority given to Mr. Wronker-Flatow, but they say that the revocation of Mr. Wronker-Flatow's authority is of no effect, in that that authority was in law irrevocable. It is agreed that the question of the interpretation, or of the validity, of the revocation of the Washington agreement and the document of Jan. 14, 1936, falls to be decided by German law, though there is a conflict as to the law to be applied to the power of attorney.

I am satisfied—and indeed it was really not seriously disputed—that the defendants had received this money, and that they paid it over to Mr. Wronker-Flatow on his instructions after they had had the notice contained in the letter of Mar. 22, 1937. But for a somewhat minor point, it would seem that the plaintiffs cannot recover this back, if Mr. Wronker-Flatow had authority on behalf of the plaintiffs to give those instructions. This minor point, which was raised by counsel for the plaintiffs, was this. Assuming that Mr. Wronker-Flatow had authority, he could only give instructions within the scope of his authority, and, if the instructions to pay to him the amount paid by him to a German typist for drafting and typing a long letter, which it was said was not written on behalf of the plaintiffs or on their business, or the amount of his fare and expenses for going to St. Gall to give evidence in an arbitration against the plaintiffs, were outside the scope of Mr. Wronker-Flatow's authority, those amounts could be recovered from the defendants. The total of those amounts is £21 12s. 11d.

The facts are as follow. One Meiwald, now a German subject, was, in or about 1933, the owner of certain patents for certain machines which may be termed compendiously knitting machines. Some, if not all, were the result of his own invention, and in Sept., 1933, he formed the plaintiff company. Efforts were made to market these patents and machines in various parts of the world, but by 1935 little, if any, headway had been made. In that year, Mr. Meiwald had been in the United States of America, and had entered into negotiations with two industrial

concerns, negotiations which he hoped might lead to business. On his return to Europe, he got in touch with Mr. Wronker-Flatow, and there was an interview in Basle at which it was agreed that Mr. Wronker-Flatow should go to the United States of America to endeavour to bring those negotiations to a successful conclusion. Mr. Wronker-Flatow was a German subject who practised in commercial and international law in Germany from 1911 to 1933. He acted for some big American concerns, amongst other clients, but from 1933 he ceased to carry on his German legal practice, and took an active part in the management of the Opel works, giving, in the course of his duties, *inter alia*, the benefit of his legal knowledge. In 1935, he left Germany with his wife and children, intending never to return, having lost all he had, and came to this country and took advice as to starting here as an adviser in German law. His financial position was critical, and he needed some occupation which would provide for his family. In Sept., 1935, Mr. Meiwald, on behalf of the plaintiffs, engaged him to go to America, as I have previously stated, and paid him a considerable sum for expenses. In fact, on Sept. 13, 1935, there is a document in which Mr. Wronker-Flatow acknowledges receipt of 200 dollars, 700 French francs, and 600 Swiss francs :

... which amounts I am applying on account of the travelling expenses provisionally fixed at \$1,000. The balance is to reach me in the next few days in a crossed cheque on New York.

On the same day, Mr. Wronker-Flatow set out in a letter the scope and terms of his employment by the plaintiffs. He went to the United States of America, and there found that the concerns which Mr. Meiwald hoped would conclude agreements with regard to the machines or the patents could not, or would not, go any further, and he realised that some other means of marketing or exploiting the machines or the patents must be devised. Accordingly, after correspondence, Mr. Meiwald went to meet Mr. Wronker-Flatow in the United States of America to discuss the matter, and, after discussions there, an oral agreement was come to, an oral agreement which, on their way home on board the s.s. Washington, was on Dec. 19, 1935, put into writing. That agreement is referred to as the Washington agreement. In outline, the scheme was that the plaintiffs should be a mere holding company, and that, with the assistance of Mr. Wronker-Flatow, capital should be found to float other companies in other countries for the promotion of the business. It was hoped that Mr. Wronker-Flatow, with his acquaintance with business men, would be able to raise the finance. On his return to Europe, Mr. Wronker-Flatow proceeded to busy himself in trying to find finance. In fact, other national companies were formed, one of which was the defendant company, incorporated on Dec. 10, 1936. Meanwhile, a copy of the Washington agreement was made and certified, and approved by Dr. Suter, the director of the plaintiff company.

There then came into existence the third document upon which reliance

is placed in this action—namely, the power of attorney of Feb. 10, 1936. There is some conflict of evidence as to how or why this document was given to Mr. Wronker-Flatow. I have heard the evidence of, and seen, Mr. Meiwald and Mr. Wronker-Flatow in the witness-box, and am satisfied that the only reason it was given was in order that Mr. Wronker-Flatow, when dealing with third parties in the exercise of his functions under the Washington agreement, should be able to produce some evidence of his authority to act for the plaintiff company. It was not convenient to show to third parties the Washington agreement, containing, as it did, the financial arrangements come to between the plaintiffs and Mr. Wronker-Flatow. At the same time, the power of attorney gave Mr. Wronker-Flatow authority to do what he had no power to do before—namely, to join the board of any national company and to exercise voting powers.

By Mar., 1937, a feeling of distrust had arisen between Mr. Meiwald and Mr. Wronker-Flatow. Rightly or wrongly, each was extremely displeased with the activities and conduct of the other in the business. It was quite obvious, both from their demeanour in the witness-box and from the evidence given, that there was, and is now, very little love lost between them. The climax was reached when Mr. Wronker-Flatow, then in New York, received from the plaintiffs the cable dated Mar. 30, 1937, which was as follows :

All powers of attorney hitherto granted in *re* Sinfra are hereby withdrawn in their entirety in the name of the management of Sinfra A/G, St. Gall. Meiwald will take over documents and other data after his arrival there.

There was a counterblast, dated Mar. 23, 1937, from Mr. Wronker-Flatow :

My rights are based on bilateral contract. Unilateral revocation therefore illegal and ineffective. If at the beginning of April in Basle I do not find apology for gross defamation I will in Vienna before the Criminal Courts clear up all matters concerning St. Gall in such a manner that detractions from honour are finally terminated.

To that counterblast Mr. Meiwald replied by a cable, dated Mar. 23, in the following terms :

Withdrawal of powers of attorney as directed final. I repudiate all assertions made as untrue. The repeated threats are to no purpose.

Meanwhile, on Mar. 22, 1937, Mr. Meiwald, on behalf of the plaintiffs, gave notice to the defendants that the power of attorney formerly issued to Mr. Wronker-Flatow, which related to the management and organisation of Sinfra, had been withdrawn. If, therefore, the two cables to Mr. Wronker-Flatow revoked validly any authority which he had to act for the plaintiffs, the defendants had notice of it. Indeed, they appreciated their position, and took legal advice, and, after doing so, they deliberately refused to acknowledge that Mr. Wronker-Flatow's authority had been validly revoked, and their case is that the authority given to Mr. Wronker-Flatow is irrevocable. They continued to treat Mr. Wronker-Flatow as the attorney and authorised agent of the plaintiffs, and have acted on his instructions, and treated all his acts as the acts of the plaintiffs. The

main question, therefore, is whether or not the authority, if any, given by the Washington agreement and by the power of attorney, was validly revoked. However, before deciding that vital question, certain other matters have to be considered.

Counsel for the defendants conceded that here there was no case of implied authority which could be substantiated. The authority, if any, is to be derived from the Washington agreement or the power of attorney. So much of the pleaded case which set up an implied authority was abandoned at the trial. The first question which was argued was whether or not the Washington agreement gave Mr. Wronker-Flatow any authority to act on behalf of the plaintiffs so as to bind them *vis-à-vis* third parties. On this question, I have heard the evidence of three expert German lawyers as to the interpretation and effect which would be given to the agreement in a German court. There was a wide divergence of view expressed. For the plaintiffs, Professor Wolff, whose attainments and knowledge of German law (as was most handsomely admitted by the other expert witnesses) entitle his opinion to the very greatest respect, said that this agreement contains no implicit power to Mr. Wronker-Flatow to conclude agreements with third parties which would be binding on the plaintiffs. No express power of attorney is conferred by this document. It required supplementing by the establishment of an authority, such authority being supplied by the power of attorney of Feb. 10, 1936. He stated that, until he got this power of attorney, Mr. Wronker-Flatow did not represent the plaintiffs *vis-à-vis* third parties, and had no authority to bind the plaintiffs. He said that a German court would thus construe the document. Professor Cohn, a gentleman of very considerable eminence in his profession, took the opposite view, and was satisfied that Professor Wolff's opinion was quite erroneous. He said that a German court would undoubtedly hold that, as the agreement gave permission to Mr. Wronker-Flatow to do the things set out in what he described as the preamble to the agreement—that is to say, the first paragraph—it was to be assumed that he was given the powers to do what he was permitted to do, though he agreed with Professor Wolff that in German law there was a sharp distinction between a power to act so as to bind a principal and an agreement which merely regulated the internal relationship between a principal and an agent. Another German lawyer, Dr. Kauffmann, expressed the view that a German court would undoubtedly hold that the Washington agreement conferred upon Mr. Wronker-Flatow all the powers necessary to bind the plaintiffs *vis-à-vis* third parties in respect of the matters referred to in the agreement, thus supporting Professor Cohn's view. He said that it would be inconceivable that he could carry out the agreement without having a commensurate power. All the German expert witnesses agree that by German law all the surrounding circumstances of the case may be considered in construing the agreement, in order to ascertain the real intention of the parties, including post-contractual conduct.

Dr. Kauffmann expressed the view that, so far from the Washington agreement conferring no authority upon Mr. Wronker-Flatow to bind the plaintiffs, it gave him wider powers than the power of attorney, with the exception of the power of voting at board meetings of the national companies.

- A These conflicting views upon a question of fact render the task of an English judge, in deciding how a German court would act, one of some difficulty, but I have come to the conclusion that a German court would hold that the Washington agreement did put Mr. Wronker-Flatow into the position of an agent who was entitled to bind the plaintiffs
- B in all matters within the scope of that agreement, and that the power of attorney was merely given as ancillary to the agreement, in the sense that it afforded convenient evidence to be shown to third parties that those powers had been conferred upon him by the plaintiffs.

- C One of the questions which I have to decide is whether or not, assuming that I am right in holding that the Washington agreement did confer authority upon Mr. Wronker-Flatow, that authority could be revoked. This raises a further question—namely, what is the nature of that agreement? I am satisfied that, if in German law that agreement is a partnership agreement, any authority given by it could not be revoked.
- D I have, therefore, to decide whether this agreement is a partnership agreement or a contract of service. This question was much discussed, and the three German lawyers to whom I have already referred all differed in their view. Professor Wolff was quite positive on the matter. He said that it was absolutely certain under German law that, under
- E that agreement, Mr. Wronker-Flatow did not become a partner. *Inter alia*, he pointed out—and indeed it was not disputed—that Mr. Wronker-Flatow's letter of Sept. 13, 1935, setting out the scope and terms of his employment by the plaintiffs, indicated clearly that the original agreement of Sept. 13, 1935, was a service contract. Professor Wolff said
- F that, accepting the facts as I have found them, the Washington agreement did nothing to alter that relationship. Dr. Kauffmann asserted that the Washington agreement was not a service agreement, and that it in express terms, and not merely by implication, constituted a partnership agreement. Upon this point, he wholly differed from
- G Professor Wolff. He said that it was a genuine partnership, and entirely disagreed with Professor Cohn, whose view was that it was not a partnership, but a quasi-partnership. Dr. Cohn's view was that this agreement constituted neither a service agreement nor a partnership, but something between the two.

- H Of these conflicting opinions on German law I prefer the view of Professor Wolff, and I am satisfied that in German law this is a service agreement, and not a partnership or a quasi-partnership. If that is so, in German law could the authority conferred by it be revoked? Here again I prefer the view expressed by Professor Wolff to that of the other German lawyers. It is conceded that the policy of the German

law leans against the irrevocability of authorities and powers, and only in certain well-defined cases will a German court, applying German law, hold that a power is not revocable. Amongst other things, Professor Wolff cited a decision of the German Supreme Court, reported in Civil Cases, Vol. 52, p. 99, besides supporting his view by passages from well-known German text-writers. So much for the Washington agreement. There remains the question of the revocability of the power of attorney. A

The first question which was argued before me was as to what law this court was to apply to a consideration of that power of attorney, and particularly as to the question of its revocability. A power of attorney is not a contract. It is a one-sided instrument (see *per* LINDLEY, L.J., in *Chatenay v. Brazilian Submarine Telegraph Co.* (1), at p. 85), and, although it was argued that a different law should be applied to the document depending upon whether the court was considering the formation, the extent, the operation or the termination of the power, I am satisfied that the proper law for an English court to apply is the law of the country in which the power is to operate—that is to say, English law. In this particular case, the document on the face of it gave to Mr. Wronker-Flatow powers of attorney in every part of the globe, but it was the undoubted intention of the parties (an intention which was in fact carried out) that several copies of the document should be in existence, each one certified for use in a particular country. The particular power of attorney which I have to consider in this case was one to operate in England, and in England only. A large number of authorities was cited to me, and, after consideration of those authorities, and after hearing argument, I am of opinion that this power of attorney was revocable, and was validly revoked. B C D E

I am unable to find here that there was an authority coupled with an interest, within the meaning of that expression, such as to render this power irrevocable. In *Clerk v. Laurie* (2), WILLIAMS, J., said, at p. 200 : F

What is meant by an authority coupled with an interest being irrevocable is this,—that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. G

This passage was cited with approval in *Re Hannan's Empress Gold Mining & Development Co., Carmichael's Case* (3), by LINDLEY, L.J., at p. 648, and, as I understand it, is clearly the law. The principle was also laid down by WILDE, C.J., in *Smart v. Sandars* (4), at p. 917, in delivering the judgment of the court, in almost similar language, and WILDE, C.J., cited with approval the words of LORD KENYON in *Walsh v. Whitcomb* (5). The principle is also clearly set out in BOWSTEAD ON AGENCY, 9th Edn., art. 140, pp. 332, 333. H

It is conceded that, if the English court should apply Swiss law to the question of the revocability of this power of attorney, the answer in Swiss law would be that it is revocable. If this court has to apply

German law, I am satisfied that the German law would also say that this power of attorney was validly revoked. Whatever system of law, therefore, is to be applied, English, German or Swiss, the result is, in my opinion, the same. The plaintiffs, therefore, are entitled to succeed in this action, and to recover the sum of £132 14s. 8d. It follows that the

A defendants' counterclaim for three declarations and damages (which damages, if any, it was agreed were to be referred) in respect of acts done, or purporting to be done, by Mr. Wronker-Flatow on behalf of the plaintiffs after the revocation of his authority must fail, and there must be judgment accordingly.

B *Judgment for the plaintiffs on the claim for £132 14s. 8d. with costs, and judgment for the plaintiffs on the counterclaim with costs.*

Solicitors: R. C. Bartlett & Co. (for the plaintiffs); Buckeridge & Braune (for the defendants).

C [Reported by F. HONIG, Esq., Barrister-at-Law.]

Distinguished. JARMAN v. LAMBERT
& COOKE, LTD. [1951] 2 All E.R. 255.

ROBINSON v. STERN.

D [COURT OF APPEAL (Scott, Clauson and Goddard, L.J.J.), May 5, 1939.]

Evidence—Admissibility—Documentary evidence—Written statement made at police station immediately after an accident—"Proceedings anticipated"—Evidence Act, 1938 (c. 28), s. 1 (3).

E The defendant was driving a motor car when her car injured a child about 7 years of age. She at once proceeded to a police station, where she made a statement upon the usual police form commencing with the usual caution. In an action for personal injuries, this statement was admitted in corroboration of the defendant's evidence:—

HELD: this statement was inadmissible, by reason of the provisions of the Evidence Act, 1938, s. 1 (3), because, at the time it was made, proceedings were anticipated involving a dispute as to the facts referred to therein.

F [EDITORIAL NOTE. There is said to be a growing practice of putting in evidence statements of the nature here considered. It seems obvious that, if a caution is administered, the person making the statement must anticipate that proceedings may be taken at some later date, and, therefore, the matter seems wholly covered by sect. 1 (3) of the Act. GODDARD, L.J., in his judgment, mentions that, in the

G familiar cases where written statements were admitted under the common law, it was necessary that there should not be a *lis mota* at the time the statement was made. These cases, of course, were concerned with pedigree or title to property, but the same principle applies to all statements of this nature. That is, they should be made at a time when the person making them has no idea in his mind of their being used in legal proceedings.

H AS TO NECESSITY FOR DECLARATION TO BE *Ante Litem Motam*, see HALSBURY, Hailsham Edn., Vol. 13, pp. 592, 593, para. 659; and FOR CASES, see DIGEST, Vol. 22, pp. 121-123, Nos. 965-982.]

Cases referred to:

(1) *Whitelocke v. Baker* (1807), 13 Ves. 510; 22 Digest 119, 935.

(2) *Butler v. Mountgarret* (1859), 7 H.L. Cas. 633; 22 Digest 121, 959.

APPEAL by the plaintiff from a judgment of CROOM-JOHNSON, J., dated Nov. 15, 1938. The facts are fully set out in the judgment of SCOTT, L.J.

E. G. Hemmerde, K.C., and *A. McFarland* for the appellant.

F. E. Pritchard, K.C., and *Eric Errington* for the respondent.

SCOTT, L.J. : This is an appeal on behalf of the plaintiff, a child of seven, who was injured by the defendant's motor car, which the defendant, Betty Stern, was driving in Birkenhead after dark on Oct. 8, 1937. The question concerns the admissibility under the Evidence Act, 1938, of a statement made by the defendant to the police at the police station at Birkenhead, close to the scene of the accident, immediately after the accident, on the suggestion of the police, and the question in the case is whether or not, assuming the statement to have been a document within the meaning of sect. 1 (1) of the Act, the circumstances were such as to make the statement inadmissible by reason of the provisions of subsect. (3) of that section. The statement was made by the defendant on an ordinary police form for statements taken by the police, with a printed heading, and I read it as filled in by the defendant and signed by her :

I, Miss Betty Stern, residing at Upton Manor, Upton, Wirral, do hereby declare that the following caution was administered to me at 6.35 p.m. on Oct. 8, 1937, by Constable 57A, Bushell : "Do you wish to say anything about this matter ? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."

That obviously is the ordinary formula, a question put to a witness in order to make sure that the statement is made voluntarily. The statement continues as follows :

After hearing such caution and fully understanding the terms thereof, I desire to make the following written statement. . . .

Most of that is in print, but it was immediately followed by a statement in which she described the facts of the accident in such a way as to indicate that it was not her fault that the collision with the small boy had taken place, but the small boy's fault. At the end, she says :

I have read carefully the statement I have made and I have had the opportunity to add to or delete from the statement anything I desired.

As a matter of fact, there were two alterations by her in it. The statement then concluded :

It is a true record of what I have said.

She duly signed it, and the police constable witnessed it. The judge, after the defendant had given her evidence in the case, on the submission of the defendant's counsel, admitted that statement, and in the result gave judgment for the defendant. Hence the plaintiff's appeal.

Counsel for the appellant submitted that, by the very words of sect. 1 (3), that statement, assuming it to be a document within the meaning of

the earlier part of the section, was excluded. Subsect. (3) provides as follows :

Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

- A It is obvious that the defendant was a person interested, and, on the assumption I have already made, all the provisions of that subsection are satisfied unless it can be said that, not only were proceedings not pending (which must be conceded), but also proceedings were not anticipated, involving a dispute as to facts stated in the statement.
- B To my mind, it is impossible for the defendant to say that proceedings were not anticipated, and I hold quite definitely that at that time, immediately after running into the small boy, when she went to the police station, it was quite obvious that, although proceedings had not been started, they must, within the meaning of the subsection, have been anticipated. I cannot help thinking that necessarily the word "anticipated" should be construed as including "likely," but, even assuming that the word "anticipated" should be given the interpretation of "anticipated by the person making the statement," in my view, it is quite impossible to contend that this defendant did not
- D anticipate proceedings, having regard to the facts of the case and to the further internal evidence of the statement itself, with its initial questions and statements, which I have already read, about a statement being taken down in writing and being a statement which may be given in evidence at a later stage. No doubt that statement is primarily
- E addressed to criminal proceedings, but it is essential to take into account the fact that the defendant herself signed the statement, and, therefore, it is, to my mind, wholly impossible to say that she did not anticipate proceedings within the meaning of the section.

- On the question as to whether the statement comes within that
- F provision of subsect. (3) vetoing the use of such a statement in evidence in such a case as that, it is not necessary, in my view, to add anything further. However, it is said by counsel for the respondent that no substantial injustice was done in this case by admitting this statement. In my view, that submission is necessarily answered effectively by
 - G quoting a single sentence from the judgment. Towards the end of his judgment, the judge said :

I had better add, in view of the fact I am resting, and deliberately resting, my judgment in this matter to a not inconsiderable extent on the document which has been made evidence as the result of sect. 1 of the Act of 1938, the view I have formed about damages, in case another tribunal should take a different view from the view

- H I have expressed.

Then he states his view about damages, and finds a definite figure, on the assumption that the Court of Appeal, when asked to consider the matter, might think fit to enter judgment for the plaintiff. That we do not feel it possible to do, and we think that the proper order is that there should be a new trial. However, the sentence in the judgment

is conclusive, and it is impossible for the respondent to say that it is clear that the admission of this document would have had no effect on the decision of the judge. That was at the end of his judgment, when he was assessing damages for the purpose of an appeal. For those reasons, I am of opinion that the judge had no right to admit this statement, and that we must allow the appeal. A

I only want to add one further observation about the Act. It is a difficult Act to construe for certain purposes, as any Act of the kind necessarily is when applied to actual circumstances. Whether it was contemplated when the Act was passed—that is to say, whether it is really the intention of the Act—that a party to litigation, or a person who was going immediately to become a party to litigation, should be able to make a statement in writing, and, so to speak, get contemporaneous proof that the story she told was the story as it was in her mind immediately after the occurrence of the matter complained of, is a matter upon which this court need not express any opinion, and I express none. B C

CLAUSON, L.J. : I agree. There is only one matter to which I wish to refer. The judge appears to have thought that he was justified in holding that, at the time she made the statement, the lady did not anticipate proceedings because of an answer which she gave to a question which he put to her in the box. The judge was under some misapprehension, I think, and I only want to make it clear that the answer which the lady gave may well be—in fact, I have no doubt whatever that it is—a perfectly truthful answer, but not an answer which, in my view, justified the judge in holding that, at the time she made the statement, she did not anticipate proceedings. She was asked this : D E

Miss Stern, you had had a nasty accident, and I suppose you saw this boy was seriously hurt ?—Yes.

When you went along to the police station, did you anticipate that there may be some proceedings against you ?—I had not thought about that.

You had not thought about it. You know your duty, as a motorist, was to report the accident ?—Yes. F

Is that why you went ?—I think the policeman suggested it.

I feel no doubt that what she said was perfectly true. This lady had just done most grievous damage to a child, and her thoughts, I have no doubt, were full of that, and pity for the child, and distress at the whole occurrence. I think her answer that she had not thought about proceedings at that moment was almost certainly entirely true. However, when she gets to the station, and she has time for reflection, she makes a statement which, to my mind, could not possibly have been made by anybody who had not present to her mind the possibility, at least, of proceedings of some character. For that reason, it appears to me that the judge was plainly wrong in holding that, at the time she made the statement, she did not anticipate proceedings. G H

GODDARD, L.J. : I agree. I should like to add a few words showing what, to my mind, is the right meaning to be put upon sect. 1 (3). It

should be remembered that, before the Evidence Act, 1938, and, indeed, at common law, there were cases in which written statements made in the past by persons could be admitted as evidence; principally, no doubt, in cases relating to pedigree and cases relating to title. In those cases, however, it was always held that the statement could not be admitted if, at the time it was made, or anterior to the time it was made, there was what was always called in the old cases a *lis mota*. The reason for that is nowhere better stated than it is by LORD ELDON in *Whitelocke v. Baker* (1). He puts it in this way, at p. 514 :

- B . . . all [this class of statements] are admitted upon the principle, that they are the natural effusions of a party, who must know the truth ; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth.
- C A reference on this point may also be made to a decision of the House of Lords in *Butler v. Mountgarret* (2), where LORD CRANWORTH cites that passage from *Whitelocke v. Baker* (1) which I have just read. How can it be said, when a young lady goes to a police station and has the caution administered to her, which is the caution in the form now approved by what is called in the Court of Criminal Appeal the Judges' Rules, that her mind must stand in "an even position" ? I am not
- D talking about this case, for I have no doubt, and I am willing to assume, that this lady gave absolutely unbiassed and fair information. In the majority of cases, however, when a person has that caution administered to him, what would be his natural tendency ? It would be to do that which it is the very object of the caution that he shall do—namely,
- E not incriminate himself. It is the whole object of the caution to warn the person : " You need say nothing, but, if you do say anything, mind you do not incriminate yourself." It seems to me that that is very far from saying, in those circumstances, that a person's mind "stands in an even position, without any temptation to exceed or fall
- F short of the truth." When one is considering the admissibility of evidence which is made admissible by statute, and the restrictions upon its admissibility imposed by the statute, one has to see that one is not giving some wider interpretation to the Act than the language bears. I think, however, that, when one is considering these words "when proceedings
- G were pending or anticipated"—and *Butler v. Mountgarret* (2), to which I have referred, shows that "anticipated" does not mean an immediate proceeding, or a threatened proceeding, or anything of that sort—the judgment which I have read of LORD ELDON is most helpful in considering what meaning one should put upon them. I can only say for
- H myself that, having had to try, since this Act came into operation, when I have been sitting as an additional judge of the King's Bench Division, several running-down cases, I have noticed that there has been a tendency—and we are told by counsel in this case that there is a growing tendency now at the assizes—to tender these statements in evidence. For myself, I do not think that I ever had formally to rule upon the

matter as to whether or not they were admissible, but I always strongly discouraged counsel from putting them in. They do not seem to me to be a class of document which the Act is really contemplating. I never can see that they really assist in coming to a conclusion as to the true facts of an ordinary running-down action. If this decision puts an end to that growing practice, I think that it will be a very good thing. A

Appeal allowed.

Solicitors: *Berkson & Berkson*, Birkenhead (for the appellant); *Jacques & Co.*, agents for *Sydney Hill, Reney Smith & Co.*, Liverpool (for the respondent). B

[Reported by C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BURR v. WARE RURAL DISTRICT COUNCIL.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and du Parcq, L.JJ.), C
April 24, 1939.]

Discovery—Interrogatories—Defendants' employee previously witness at inquest—Defendants asked to admit statements made by their employee at inquest—Employee not an agent to make admissions.

A motor cyclist was killed in a collision between his motor cycle and a lorry driven by a servant of the defendants. The driver was the only person who could give evidence as to how the accident happened. This driver made certain statements at the inquest, and in this action the plaintiff (the father of the motor cyclist) sought to administer an interrogatory to the defendant council asking that the defendant council should admit that their driver made certain statements at the inquest. It was not suggested that the driver was an agent of the council to make any admission :— D

HELD : as the admissions of the driver would not be evidence against the defendant council in the absence of proof that the driver was an agent to make them, the proposed interrogatory must be disallowed. E

[**EDITORIAL NOTE.** In *Sloan v. Hanson* (1), the convenient course was taken of administering to the defendant interrogatories relating to evidence given at an inquest after a fatal accident. This case illustrates a limitation upon this convenient procedure. If the evidence given at the inquest is given by an agent of the defendants in the action, it must be shown that that agent was an agent with authority to make admissions. The importance of the matter lies in the fact that, one driver having been killed in the collision, the other is the only person who is in a position to give evidence of the details of the disaster. F

AS TO INTERROGATORIES IN CASES OF NEGLIGENCE, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 421, 422, para. 516; and FOR CASES, see DIGEST, Vol. 18, pp. 212, 213, Nos. 1599-1610.] G

Cases referred to :

- (1) *Sloan v. Hanson*, [1939] 1 All E.R. 333; Digest Supp. H
- (2) *Griebart v. Morris*, [1920] 1 K.B. 659; 18 Digest 212, 1599; 89 L.J.K.B. 397; 122 L.T. 736.

APPEAL by the defendants from an order of HALLETT, J., dated Mar. 28, 1939, allowing an interrogatory which the plaintiff sought to administer to the defendants. On Apr. 29, 1938, a collision occurred

on a country road between a motor cycle and a motor lorry driven by an employee of the defendant council. The motor cyclist was killed, and an inquest was held as to the circumstances of his death. In an action brought by the father of the deceased motor cyclist against the defendant council, it was sought to administer an interrogatory asking that the council should admit certain statements made by their driver at the inquest. The driver of the lorry was the only person who had any knowledge, or could give any evidence, of the details of the accident.

H. D. Samuels, K.C., and D'Arcy Edmondson for the appellants.

W. H. Moresby for the respondent.

B *Samuels, K.C.* : The interrogatory in this case was directed to a person who was not an agent of the council. The plaintiff is seeking to administer an interrogatory to the defendants in the action in regard to something which is inadmissible in evidence. What the defendants' driver said some 5 or 6 days after the accident could not be evidence of an admission made by the defendants.

C *Moresby* : The judge has exercised a discretion in this matter and there is nothing to show that any injustice arises in consequence. Under R.S.C., Ord. 31, r. 2, there is a rule of law which has to be obeyed and considered as to whether an interrogatory shall be administered or not.

D It is necessary, in the interests of justice, that leave should be given to administer the interrogatory in question. There is no evidence of the accident except that tendered by the driver of the lorry. The plaintiff's case cannot be put to the jury unless some *prima facie* evidence of negligence can be obtained, and it is sought to get evidence of the manner in which the defendants' driver drove.

E *Griebart v. Morris* (2) was a similar case to the present one. In that case, the plaintiff was rendered unconscious and there could be no evidence on his part as to how the accident happened.

F *SIR WILFRID GREENE, M.R.* : This appeal must be allowed. The interrogatory which the plaintiff seeks to administer to the defendant corporation is one asking that the defendant corporation should admit that their lorry driver made certain statements at the inquest. It is not suggested that the lorry driver was the agent of the defendants to make admissions, and admissions by the lorry driver would not be evidence against the defendant in the absence of proof to that effect.

G The judge thought that the case was really similar to that of *Sloan v. Hanson* (1), decided in this court. In that case, this court confirmed an order of *ASQUITH, J.*, who had allowed an interrogatory asking whether or not the defendant had at an inquest made certain statements which were set out in conjunction with the interrogatory. In that case, the person whom it was sought to interrogate was the defendant himself, and the admission which the answer to that interrogatory would have elicited would have been an admission by the defendant himself. In the present case, however, the only result of the answer to the interrogatory

H

would be, not an admission by the defendants as to the way in which their driver was driving, but an admission by the defendants that on a particular occasion their servant, not being an agent to make an admission, made a particular statement, which is a different thing altogether.

It is worth noticing that in *Griebart v. Morris* (2) the interrogatories which were allowed were interrogatories relating, not to an admission by A somebody in the employment of the defendant, but to the actual way in which the defendant's car was being driven, which is a different thing altogether.

In the present case, the authority of *Sloan v. Hanson* (1) is, in my judgment, no authority to support the present order, which, in my B opinion, cannot stand, for the reasons which I have given. The appeal must, accordingly, be allowed, but that will be without prejudice to any later application which may be made on behalf of the plaintiff for leave to administer such interrogatories as he might be advised will be C unobjectionable in form and substance.

FINLAY, L.J. : I agree.

DU PARCQ, L.J. : I agree. As I was a party to the decision in *Sloan v. Hanson* (1), perhaps I ought to add that it surprised me to hear D it used as authority for the proposition that the defendant might be required to make admissions as to what some person not an agent to make admissions might have said.

Appeal allowed with costs in both courts.

Solicitors : J. K. Edmondson & Co. (for the appellants) ; J. F. W. E Harrison (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

BAKER v. PROVIDENT ACCIDENT AND WHITE CROSS F INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Cassels, J.), May 1, 1939.]

Insurance—Third party risks—Person carried by reason of or in pursuance of a contract of employment—Employee provided with transport within certain limits—Employee injured when travelling beyond those limits—Road Traffic Act, 1930 (c. 43), s. 36 (1) (b) (ii). G

The plaintiff was employed at the C. Laundry, which was situated in a somewhat isolated spot about a mile from the main Manchester to Bury road, making it necessary for the owners of the laundry to grant their employees certain transport facilities for getting to and from their employment. This the owners did by the use of their own vans. Along H the main Manchester to Bury road was a regular service of buses, which passed B. Bridge, near the point at which the road to the laundry left the main road. The plaintiff, while riding away from work in a laundry van driven by one C., a laundry employee, was injured as the result of a collision between the van and another vehicle at a point beyond B. Bridge on the way to Bury, and she subsequently obtained a judgment

for damages against C. and G., the driver of the other vehicle. The judgment was satisfied in part by G., and the plaintiff then brought an action against the defendant company as the laundry owners' insurers against third party risks in respect of the van. The policy, in accordance with the Road Traffic Act, 1930, s. 36 (1) (b) (ii), covered passengers carried in the van by reason of or in pursuance of a contract of employment. It was found as a fact that the owners of the laundry had given permission to their employees to travel on their vans to B. Bridge, but no further :—

HELD : (i) beyond B. Bridge the plaintiff was not riding in the van as a passenger with the permission or authority of the employers. The carriage of the plaintiff beyond this point was not therefore a carriage by reason of or in pursuance of her contract of employment, and the defendant company incurred no liability under the policy in respect thereof.

(ii) absence of notice under the Road Traffic Act, 1934, s. 10 (2), if it is relied upon, should be pleaded.

- C EDITORIAL NOTE.** The construction of the Road Traffic Act, 1930, s. 36 (1) b) (ii) was considered in *Izzard v. Universal Insurance Co., Ltd.* (1). The matter is here carried a stage further. The employers had set a definite limit upon the distance which their employees were to be carried in their vans, and it is held that, if they are carried beyond those limits, there is no liability upon the insurers of the employers under the usual policy taken out in conformity with the above section.
- D AS TO THE ROAD TRAFFIC ACT, 1930, s. 36, see HALSBURY, Hailsham Edn., Vol. 18, p. 561, para. 909; and FOR CASES, see DIGEST, Supp., Insurance, No. 3217ff et seq.]**

Cases referred to :

- E** (1) *Izzard v. Universal Insurance Co., Ltd.*, [1937] A.C. 773; [1937] 3 All E.R. 79; Digest Supp.; 106 L.J.K.B. 460; 157 L.T. 355.
- (2) *Wyatt v. Guildhall Insurance Co., Ltd.*, [1937] 1 K.B. 653; [1937] 1 All E.R. 792; Digest Supp.; 106 L.J.K.B. 421; 156 L.T. 292.
- (3) *Tattersall v. Drysdale*, [1935] 2 K.B. 174; Digest Supp.; 104 L.J.K.B. 511; 153 L.T. 75.
- F** (4) *St. Helens Colliery Co., Ltd. v. Hewitson*, [1924] A.C. 59; 34 Digest 280, 2364; 93 L.J.K.B. 177; 130 L.T. 291; 16 B.W.C.C. 230.
- (5) *Lees v. Dunkerley Brothers*, [1911] A.C. 5; 34 Digest 496, 4096; 80 L.J.K.B. 135; 103 L.T. 467; 4 B.W.C.C. 115; affg. S.C. sub nom. *Gibson v. Dunkerley Brothers*, 102 L.T. 587.

G ACTION under the Road Traffic Act, 1934, s. 10, to recover from the defendants the amount of the judgment, or a part of the amount of the judgment, awarded the plaintiff in a previous action against Graham and Cordery in respect of injury and damage which she had suffered by reason of the negligence of either or both of them. The facts are fully set out in the judgment.

H *D. P. Maxwell Fyfe, K.C.*, and *C. N. Shawcross* for the plaintiff.
B. L. A. O'Malley for the defendants.

Shawcross : This policy covered any person driving the laundry van on the order, or with the permission, of the assured, the Bleachers Association, Ltd., against liability to third parties, including (by an indorsement) passengers. Therefore, following *Izzard's* case (1), the plaintiff at the time was being carried "by reason of or in pursuance of" her contract of employment, within the meaning of those words in the

Road Traffic Act, 1930, s. 36 (1) (b) (ii), and therefore the liability in respect of which the plaintiff had obtained judgment against Cordery was a liability required by the Road Traffic Acts to be covered by a policy. Consequently, Cordery being a person driving on the order or with the permission of the employers, he was covered at the time of the accident by the defendants' policy. Cordery was driving the vehicle at the time with the permission of his employers. Whether he was deviating from his authorised route or carrying forbidden passengers is, from this point of view, immaterial. The Road Traffic Acts require such a vehicle as this to be insured against liability to all passengers: *Wyatt v. Guildhall Insurance Co., Ltd.* (2). Therefore, the plaintiff, whether a voluntary passenger or one being carried by reason of or in pursuance of her employment was covered. [Counsel referred to *Tattersall v. Drysdale* (3), *St. Helens Colliery Co., Ltd. v. Hewitson* (4) and *Lees v. Dunkerley Brothers* (5).] The defendants submitted that there was no case for them to answer, as the plaintiff had not proved that the defendants had, before, or within 7 days after, the commencement of her action against Cordery, been given notice of their action. The plaintiff's reply to this submission is that, even if such notice was a condition precedent to the cause of action against the defendants, the giving of such notice must be presumed, having regard to the terms of R.S.C., Ord. 19, r. 14, the defendants in their defence not having pleaded that they relied upon any absence of such notice. The defendants ought to have pleaded the absence of notice if they desired to rely upon it.

O'Malley: At the time of the accident, the plaintiff was not riding in the laundry van with the permission or by the authority of her employers, and, unless she had permission to ride in the van at the place of the accident, she could not be held to be a passenger by reason of or in pursuance of her employment. Further, the driver of the van at the time of the accident was not driving the plaintiff with the permission of her employers. Therefore, the driver, Cordery, did not come within the clause of the policy under which the defendants agreed to treat a driver who was driving with permission of the insured as if he were the insured. Further, it was part of the cause of action of the plaintiff, and not merely a condition precedent, that the defendants should have notice of the accident, pursuant to the Road Traffic Act, 1934, s. 10 (2). The plaintiff has failed to prove that the defendants had such notice. This notice was the gist of the action, and must be pleaded by the plaintiff, as in the case of an action on a bill of exchange, when notice of dishonour is of the essence of the cause of action.

CASSELS, J.: In this action the plaintiff, Mary Ann Baker, the wife of William Arthur Baker, sues the Provident Accident and White Cross Insurance Co., Ltd., to recover from them the amount of the judgment, or a part of the amount of the judgment, which was obtained in a previous action which she brought against William Graham

and Arthur Cordery in respect of the injury and damage which she had suffered by reason of the negligence of either or both of them. In that last-mentioned action, she recovered damages to the amount of £400 against both the defendants, and her costs have been taxed at the sum of £115 15s. 10d. It came out in the course of the evidence called before
A me that she had recovered from the defendant Graham the sum of £200 towards the satisfaction of that judgment, and doubtless she seeks in this action to recover from the present defendants the balance of that judgment. The way in which she puts her claim is that there was in
B the defendant Arthur Cordery in the action which she brought against William Graham and Arthur Cordery in respect of a liability arising out of an accident to a motor vehicle which the defendant in the other action, Arthur Cordery, was driving at the time when the plaintiff in both actions met with her injury. The defendants are an insurance company which
C issues policies to cover the owners of motor vehicles against certain specified risks.

The facts in this case are fairly simple. In 1936 the plaintiff obtained employment at a laundry which was to be opened by a firm known as the Bleachers Association, Ltd., at or near to Unsworth, in the county
D of Lancashire, roughly speaking about midway between Bury and Manchester. The new laundry was called the Croft Laundry. The Bleachers Association, Ltd., are the owners of several laundries in that district. The laundry was situate in premises which had been used for the purpose of bleaching, and, by reason of that fact, these premises
E occupied an isolated spot away from the village of Unsworth and the main road.

The problem arises as to whether facilities, and, if so, what facilities, should be granted by the proprietors of the laundry with regard to transport of the women who were working in that laundry. What the extent
F of those facilities was becomes a question at issue in the course of this case, but, in order to finish my statement of the bare facts which have led up to this action, it is essential to state that the laundry was opened in Oct., 1936, that the plaintiff, Mrs. Baker, was employed at the laundry from the beginning, that upon Nov. 19, 1936, whilst riding as a passenger
G in a laundry van belonging to her employers and driven by a man named Cordery, who was also in the same employment, she, at a spot near to Bury, but on the other side of Bury from the laundry, met with an accident by reason of a collision between the laundry van driven by Cordery and a motor car driven by William Graham, and she suffered injuries. In
H respect of these injuries, she obtained judgment against Graham and Cordery for £115 15s. 10d., including her costs.

The question which I have to decide is whether she was a passenger upon that laundry van in circumstances which would have made the owners of that van liable to her, and, if they were liable to her, then the insurance company, the defendants, by reason of their policy issued to

the owners of the laundry van, would be rendered liable to her. In order to assist me in arriving at a conclusion upon that issue of fact, I have listened to a great deal of evidence. I have said that the laundry where these women worked was somewhat isolated, and that transport to and from it was, at the laundry end, somewhat difficult. It was seen that workers who came from Bolton would be able to reach by bus without any undue difficulty a place on the main road between Bury and Manchester called Blackford Bridge. Beyond that spot the laundry was a mile, or perhaps a mile-and-a-half, away. The way led over difficult country, remote and wild, and presented difficulties, certainly to women, particularly so at night. There was, indeed, some bus which went from the village of Unsworth to the main road, but the service does not seem to have been of value to the women. Attached to the laundry, and owned by the owners of the laundry, were several vans used commercially for the collection and delivery of the laundry work. A B

The facilities which were granted have been described to me differently by the plaintiff and her witnesses and by the witnesses for the defendants. The plaintiff and her witnesses sought to convince me that the facilities which were really granted were to collect the workers who lived in Bury and to drive them to the laundry and at night to drive them from the laundry back to Bury, and they quoted to me instances where they had been both picked up and dropped on various occasions at places in Bury. It was further said that the office workers, two of them, had been carried in the laundry van at night, and they lived at Radcliffe, which was, indeed, away from the main road between Manchester and Bury. The plaintiff herself told me of an instance quite early in her association with the laundry when, desiring to collect money at the Bury labour exchange, she was granted the privilege of being taken in a laundry van from the laundry to the labour exchange in order that she might collect her money. C D E

The driver of the van in this particular instance, Cordery, who, at the time of the accident, was in the employment of the laundry proprietors, and who had started work with the laundry when it opened, said : F

When employees began to arrive, I used to take some of them in my van. I was never given instructions by Mr. Greerson as to how far I was to carry the employees. On several occasions I was sent to Bolton for hands that were employed at Bolton to help them out at the new laundry. G

That means, hands who were employed at the Bolton branch of this laundry. Then he said :

As to the mornings, first of all, I was told I was to garage at Bolton purposely so that I could take the office staff to the office and take them home at night, and at nights, when it was very bad and rainy, take several of the other workers to Bury. H

Later, he said :

I have not been reprimanded by Mrs. Fewel.

It is from such evidence as that that I have had to see what facilities were granted by the owners of the laundry, but I cannot altogether disregard also

the position of affairs as it existed upon the main road between Manchester and Bury. There was a line of public service vehicles. Blackford Bridge was upon that main road. The running of this van by the laundry was a matter of money. Every mile which they ran it meant further expenditure by them. There would be every reason for providing

- A transport facilities for the employees of the laundry on to the main road, but there would be no reason which I can see for providing facilities for their transport along that main road. Mr. Greerson has told me that he granted them permission and sanction to the extent that, for these women at a certain time each morning at Blackford Bridge, for the
B workers coming from Bury, and at Whitefield Station for the workers coming from that direction, there would be a laundry van ready to take them the rest of their journey to the laundry, and that, in the evening, if there was a laundry van available, that laundry van would take them as far as Blackford Bridge. I hold that beyond Blackford Bridge on
C the way to Bury the workers at the laundry who were riding in that van as passengers were not riding as passengers with the permission of the owners of the laundry, and the driver of the van was not carrying those passengers with the permission of the owners of the laundry. From that point at Blackford Bridge, the driver of the van, in carrying those
D workers, was going beyond the limits of his authority.

These proceedings are brought upon this policy. The policy is a commercial vehicle policy, and, like any other insurance policy connected with the driving of a motor vehicle, it must comply with the law. In so far as I have been able to see, it does. By the Road Traffic Act,
E 1930, s. 36, in order to comply with the requirements of that Act, a policy of insurance must be a policy which is issued by an authorised insurer, and must insure such person, persons or classes of persons as may be specified in the policy in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on the
F road. Then there is a proviso saying that such a policy shall not be required to cover the death arising out of and in the course of his employment of a person in the employment of the insured, or a bodily injury sustained by a person arising out of and in the course of his employment. Then comes the provision which has given rise to so much discussion,
G because it seems to be worded in such a way that it constitutes an exception upon an exception. It says :

. . . (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment . . .

Then it sets out the liability which a policy shall not be required to give.

- H As I look at that exception, it means that, if a person is being carried upon a vehicle by reason of or in pursuance of a contract of employment, the policy is required to cover that person, and this policy, being in accordance with the law, does cover that person, provided, of course, that the person is being carried by reason of or in pursuance of a contract of employment. In so far as there is a difference—and there undoubtedly

is—between the phrase “in pursuance of a contract of employment” and the phrase “by reason of the contract of employment” I think its effect is this. A person is being carried in pursuance of a contract of employment, if it is a term of the contract of employment that he or she shall be carried. That is the meaning which I would attach to the phrase “in pursuance of a contract of employment.” In so far as the person may be affected by reason of a contract of employment, I would say, with reference to a case where an employer says to an employee, “Go on that vehicle,” or “Be carried upon that vehicle,” and he is only able to give that order by reason of the fact that there is the relationship of employer and employee between them, that, by reason of a contract of employment, it would certainly cover such an instance or example as arose in *Izzard v. Universal Insurance Co., Ltd.* (1), where in fact a passenger was employed, not by the insurers, but by somebody else altogether.

Be that as it may, in my view, in order to come within the terms of this policy, the passenger who is being carried upon the vehicle must be carried by reason of and in pursuance of a contract of employment. The liability which has occurred must arise during the period when that carriage of that passenger is by reason of or in pursuance of a contract of employment. The carriage of a passenger upon this laundry van from the laundry to Blackford Bridge would be the carriage of a passenger, assuming that passenger to be employed by the laundry, by reason of a contract of employment between the owners of the laundry and the passenger, the worker at the laundry. The carriage of that passenger on the way home beyond Blackford Bridge, in my view, entitled that passenger, in respect of her employers, to rights no greater than she would have if, in the course of her walking about Bury, she had met the driver of this van and had accepted from him a lift from one part of Bury to another. What arrangements passengers may have had with the driver of the van is no concern of mine, and I have had no evidence about it, but employers of workers are entitled to limit the facilities which they give to their servants upon the matter of transport in these circumstances. If the employers choose to say to the servant, “You can go on our van from point A to point B,” they are covered under the policy. If another servant of the laundry people chooses to carry his fellow-servant beyond point B, and to take him all round the country, no reasonable person can possibly say that the employers still remain liable.

At a late moment—in fact, at the last moment in the course of this case, through whose fault I know not—my attention was drawn to an indorsement upon the policy, which certainly did not appear upon the copy which was handed up to me, in which it is said that the defendants insured the owners of this van :

... against liability at law in respect of death of or bodily injury to any person not being carried for hire or reward being carried in or upon or entering or getting on to or alighting from the Ford vehicle described in the schedule to this policy notwithstanding anything to the contrary contained in para. (1) (c) of sect. II but subject otherwise to the terms exceptions and conditions of this policy.

I agree that that does not carry this case any further on behalf of the plaintiff. At the time when she was a passenger upon the laundry van owned by the insured of the defendant insurance company, she was, in my view, a stranger, without rights against anybody except Cordery, the driver of the vehicle, and such rights as she may have at common law against both Cordery and anybody else who was guilty of negligence which led to her injury. I am satisfied that in these proceedings she cannot make the employers of Cordery liable to her for her damages.

I suppose that upon that night, which was a rainy night, she was going home. It is said that the van was carrying her laundry, and, indeed, the laundry of some of the other workers, who were also upon the van. I do not think that I am called upon to decide where the truth lies in regard to that matter. It would be carrying the liability and responsibility of laundry proprietors much further than it has ever been carried before if it were to be said that the workers were entitled to accompany their own laundry home. Whether the arrangement was that the laundry should be delivered by the insured or that it should be transported by the workers themselves personally, it really makes no difference to this case. At the time when this accident happened, the workers were far beyond the limits which had been prescribed for them. I am satisfied that there was a notice upon the clock, and that the employees received verbal intimation of the arrangements which were made for their benefit. The fact that sometimes some of them used to go all the way home, the fact that Cordery instead of taking the direct route from the laundry to the garage at Bolton used to go round by Bury, the fact that he used to drop the office workers at Radcliffe, the fact that upon this occasion he was far away from his proper and authorised route, and the fact that he was on this occasion carrying the employees of the owners of the laundry, do not, in my view, show that he was acting within the scope of his employment, or with the legal authority of the owners of the laundry, and, of course, we know from the place where this accident happened that he was a long way beyond Blackford Bridge. There was one matter, perhaps, with which I ought to have dealt, although it does not affect my judgment, and that was the question of notice. My view is that that should have been pleaded, and, if the matter had reached such a stage that that point had become of importance, I should have granted an adjournment at the cost of the defendants in order that the lack of notice might be pleaded. However, the matter, in view of my judgment, ceases to be of importance. This action fails, and there must be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: A. E. Wyeth & Co. (for the plaintiff); Wm. Easton & Sons (for the defendants).

EARNSHAW v. EARNSHAW.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Macnaghten, J.), May 2, 3, 1939.]

Divorce—Desertion—Petitioner's adultery—Effect on deserting spouse's mind—Continuance of desertion—Matrimonial Causes Act, 1937 (c. 57), s. 2.

The respondent had deserted the petitioner in 1921, and in 1933 the petitioner engaged a housekeeper with whom he entered into adulterous relations. In July, 1935, the respondent took out a summons for neglect, and before the magistrates she intimated that she was willing to return to her husband, who thereupon sent his housekeeper away. The respondent, however, failed to return, and, after an interval, the housekeeper returned and the adulterous relations with her were resumed. The husband brought the present petition for divorce, alleging desertion for a period of 3 years immediately preceding the presentation of the petition :—

HELD : approving *Herod v. Herod* (1), the petitioner's adultery had clearly had no influence on the mind of the respondent, and the period of desertion had, therefore, not been interrupted by it. Consequently, the petitioner was entitled to a decree *nisi*.

[EDITORIAL NOTE.] It will be remembered that in *Herod v. Herod* (1) SIR BOYD MERRIMAN, P., carefully considered the question of the influence on the mind of the deserting spouse of the adultery of the deserted spouse. *Prima facie*, adultery would terminate the desertion, but it was held in that case that it must be shown that the adultery, even if known, would have affected his or her conduct. In the present case, the Court of Appeal approve that decision.

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-970 ; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2974-2999.]

Cases referred to :

- (1) *Herod v. Herod*, [1939] P. 11 ; [1938] 3 All E.R. 722 ; Digest Supp. ; 159 L.T. 530.
- (2) *Bowron v. Bowron*, [1925] P. 187 ; 27 Digest 561, 6168 ; 94 L.J.P. 33 ; 132 L.T. 773.

APPEAL by the petitioner from a decision of BUCKNILL, J., dated Feb. 28, 1939, whereby he dismissed the petitioner's undefended petition for dissolution of marriage. The facts of the case are fully set out in the judgment of MACKINNON, L.J.

J. Roland Adams, for the appellant : The question is whether or not the mind of the deserting spouse was affected by the adultery of the deserted spouse : *Herod v. Herod* (1). It is not the knowledge itself that matters, but the effect of it on a person. Before the justices, the wife said that she would go back to her husband, and that is clear proof of the effect on her mind of the knowledge that her husband had committed adultery. If the desertion ceased, it must have ceased at some definite time. Desertion is a continuing offence, and there must be something definite to terminate it : *Bowron v. Bowron* (2). The burden is on the respondent to show that desertion had ceased. The desertion here had never terminated.

MACKINNON, L.J. : This is an appeal from a decision of BUCKNILL, J., in a case in which the petitioner on the ground that his wife had deserted him asked for the dissolution of his marriage under the provisions of the Matrimonial Causes Act, 1937, s. 2, which made as a new ground of divorce the fact that the respondent has deserted the petitioner without

A cause for a period of at least 3 years immediately preceding the presentation of the petition. There is no doubt that in this case the wife left the husband more than 3 years before the presentation of the petition, refused any longer to live with him, and went off and lived in some lodgings of her own. No doubt at that time she deserted him. Under this section,

B a petitioner must first prove that for 3 years or more before the petition the other spouse—in this case, the wife—withdraw from the matrimonial home with the intention of not returning. There is no doubt that in this case the petitioner did prove that part of what he has to prove. Secondly, he must prove that that intention of not returning

C to him has continued until the date of the petition, and has been given effect to. If it was an intention, it has been given effect to, because the wife has not returned. She has remained away. The question is whether during that period she has remained away with an unaltered intention, formed when she first left him, of not returning to him. Of

D course, if in the 3 years she repents of the intention to stay away, she would be willing to return, but, although so willing to return, she may be prevented from so doing, prevented from carrying out her repenting of the intention, by the attitude or conduct of the husband—as, for instance, if he is to her knowledge living with another woman. I say, of course,

E to her knowledge, because, if she does not know that fact, that cannot possibly affect her frame of mind or her intentions. No case could then possibly be based on the fact that it was a justifiable continuance of her absence from him. It is proved, however, that this man at a certain date did begin to live with another woman, and, if there is some evidence

F that that was known to the wife, ought one, in the absence of any evidence, to assume that, but for that fact, she would have changed her intention and returned to him, and so put an end to the desertion, and that the extinction of a readiness to return during the 3 years was caused by reason of the man's conduct in having the other woman in his house ?

G It is quite unnecessary to express any opinion on that principle. I think that it is enough to accept the result of the most elaborate judgment of SIR BOYD MERRIMAN, P., in *Herod v. Herod* (1), which result seems to be sufficiently summarised in the headnote as follows :

H If a spouse commits adultery after he or she has been deserted, the desertion is not necessarily terminated as a matter of law, regardless of the question whether the deserting spouse knew of the adultery or whether it had any influence on his or her conduct. If it is left in doubt whether the respondent knew of the adultery or, if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. The question is to be determined according to the circumstances of each case.

Applying that principle, the question is whether the petitioner here

has proved, first, that he was originally deserted, and, secondly, that his wife's intention to keep away from him and to continue that act of desertion was not affected by the fact that to her knowledge he was at some time during the period living with another woman.

In this case, I think that there is evidence upon which I should make that inference, and I do so because of the facts which were proved as to what happened some years ago when there was an application to the magistrates, and, with their assistance, there was some attempt to heal this difference between the husband and wife. At that time, not unnaturally, being deserted by his wife, and finding it necessary in his position to have somebody to look after his house and cook for him and so forth, he had formed this association with this other woman, and that had resulted in adulterous relations. Before the magistrates, the wife intimated a willingness to go back to the husband, who said in effect: "Very well. If you do that, I will get rid of the housekeeper, and the house shall be ready for you to return." In fact, he did do that. The housekeeper was sent away, the house was ready and open and available for the wife to return, but the evidence is that, notwithstanding that, she did not carry out her promise, or her stated intention, of coming back. She came round and made a disturbance, uttered abuse about the other woman, and that sort of thing, although by that time the other woman had departed, and refused to come back to the husband's house. There was some sort of suggestion that she said: "Well, you will have to come where I want to be. I will not come back to you." In those circumstances, and thereafter, she stayed away. After a lapse of some time, being still left in this solitary condition, without anybody to cook for him or clean the house, and so forth, the man got the housekeeper back, and relations with her were resumed. In those circumstances, I should infer as a reasonable inference of fact that the wife's staying away was not at any time influenced during these 3 years by the fact that to her knowledge this other woman was living with her husband.

The result is that I am differing from the judge below on a question of fact, but it is not a question as to any reliance one might place on the demeanour of witnesses, how they conduct themselves in the box, or whether or not they appear to be truthful. The judge accepted, as I have done, the evidence, which, of course, was all one way, because the petition was undefended. and it is rather the case that I am differing from him in the inference which I think ought to be drawn from those proved and admitted facts. The judge gives his conclusion as follows

It seems to me impossible to say that the wife was unaware of the adultery because she clearly was aware of it . . . it seems to me impossible to say that she was not in any way affected or influenced by it.

That is an inference as to her state of mind. I draw the contrary inference. I think that the proper inference from the facts is that she was not in any way affected or influenced by it. That being so, I do not think that it can be said that her original departure from him and

desertion of him did not fail to continue for the 3 years up to the date of the petition. I think that this petition ought to be acceded to and a decree of divorce pronounced.

LUXMOORE, L.J. : I agree.

A MACNAGHTEN, J. : I agree.

Appeal allowed. Decree nisi granted.

Solicitors : *Gibson & Weldon* (for the appellant).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

B

WRIGHT AND ANOTHER v. NEW ZEALAND FARMERS' CO-OPERATIVE ASSOCIATION OF CANTERBURY, LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Romer), **March 27, 28, April 27, 1939.**]

C

Privy Council—New Zealand—Mortgage—Remedies of mortgagee—Sale—Un-completed contract of sale rescinded—Resale by mortgagee at lower price to another purchaser—Mortgagee not accountable to mortgagor for purchase price under first sale which he had never received.

Guarantee—Construction—Continuing guarantee for balance at any time owing—Limitation to run from time when balance sued for had been constituted.

D

The appellant Wright was the owner of a farm which was subject to a first mortgage for £9,425, and in July, 1928, he mortgaged the farm to the respondent association. In 1929, the respondents exercised the power of sale which they possessed under the Land Transfer Act, 1915, and agreed to sell the property to one Little for £15,317 5s. The purchase money was to be paid, as to £2,000, on the signing of the agreement, as to £9,425 by Little assuming liability for the first mortgage, and as to the balance at a certain date. Little was given possession of the land, but no transfer to him was ever effected, and, on his failure to carry out the contract, the respondents rescinded the agreement with Little and sold the property to another purchaser for a price considerably lower than that payable under the first agreement. The respondents credited the appellant with all moneys received from Little, and with the full price for which the property was subsequently sold. The appellant claimed that the second sale did not concern him, and that he was entitled to be credited with the whole of the price for which the property was contracted to be sold under the first agreement.

E

F

In 1909, the appellant had guaranteed to the respondent association payment by two sheepfarmers of their indebtedness to the association, the guarantee being in respect of goods supplied and advances made to them from time to time. The guarantee was to be a continuing guarantee, and was to apply to the balance that was then, or might at any time thereafter be, owing. In 1931, the appellant terminated his guarantee when the balance due to the association was then £11,816 10s. 4d., and on a subsequent default in 1934 the appellant became liable for this amount. The appellant pleaded that the claim was statute-barred, contending that his liability as guarantor was barred in respect of each advance on the expiration of 6 years from the date of the advance :—

G

H

HELD : (i) a mortgagee who, as here, contracts to sell in exercise of his power of sale, and (the land not having become vested in the purchaser) rescinds the contract, is not accountable to the mortgagor for purchase money which he has never received.

(ii) under the terms of the guarantee, the repayment of every debit balance was guaranteed as it was constituted from time to time, during

the continuance of the guarantee, by the excess of the total debits over the total credits. The number of years which had expired since any individual debt was incurred was immaterial. Limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted.

[EDITORIAL NOTE.] The exercise of a power of sale by a mortgagee is perhaps the most important aspect of the law of mortgages, since it is the most usual method of enforcing the security in cases where the mortgagor fails to pay the sum secured. In the ordinary course, a resale of the property would be made upon the failure of the purchaser to complete at or about the usual time for completion, but in the present case the default of the purchaser was at a later date, the contract of sale providing for the purchase money to be paid in instalments. The case is, therefore, an authority for the proposition that, apart from default on the part of the mortgagee selling, the latter is only liable to account for the money he actually receives from the sale and resale of the property. A

AS TO SALE BY MORTGAGEE OF MORTGAGED PROPERTY, see HALSBURY, *Hailsham Edn.*, Vol. 23, p. 442, paras. 650, 651; and FOR CASES, see DIGEST, Vol. 35, pp. 513-515, Nos. 2434-2452.] B

Cases referred to: C

- (1) *Irving v. Commercial Banking Co. of Sydney* (1898), 19 N.S.W.Eq. 54; 35 Digest 516, case q.
- (2) *Parr's Banking Co. v. Yates*, [1898] 2 Q.B. 460; 26 Digest 86, 608; 67 L.J.Q.B. 851; 79 L.T. 321.
- (3) *Waring v. London & Manchester Assurance Co., Ltd.*, [1935] Ch. 310; Digest Supp.; 104 L.J.Ch. 201; 152 L.T. 390. D
- (4) *Public Trustee v. Wallace*, [1932] N.Z.L.R. 625.

APPEAL from a judgment of the Court of Appeal of New Zealand (SIR MICHAEL MYERS, C.J., REED, SMITH and FAIR, JJ.), dated Dec. 4, 1935, unanimously affirming a judgment of the Supreme Court (JOHNSTON, J.), dated Oct. 12, 1934, dismissing the appellants' claim in their action, whereby the Court of Appeal (SIR MICHAEL MYERS, C.J., SMITH and FAIR, JJ.) unanimously dismissed the appellants' appeal from the judgment of the Supreme Court in favour of the respondent on its counterclaim for £13,384 13s. 9d. and costs. The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN. E

Charles A. Settle for the appellants. F

Wilfrid Barton, K.C., and *Alexander M. Wallace* for the respondents.

Settle: When the contract for sale has been entered into by the mortgagee, the mortgagor becomes entitled to be credited by the mortgagee with the full amount of the purchase price, whether or not it is payable by instalments. [Counsel referred to *Waring v. London & Manchester Assurance Co., Ltd.* (3) and *Public Trustee v. Wallace* (4).] In dealing with the guarantee, the Court of Appeal in New Zealand sought to distinguish *Parr's Banking Co. v. Yates* (2) from the present case, but the wording of the guarantee in this case and that of the guarantee in *Parr's case* (2) are on all fours. G

Counsel for the respondents were not called upon. H

LORD RUSSELL OF KILLOWEN: This appeal was brought by the plaintiffs in an action against the New Zealand Farmers' Co-operative

Association of Canterbury, Ltd. (hereinafter referred to as the association), from a judgment of the Court of Appeal of New Zealand which affirmed the judgment of the trial judge, by which judgment was entered for the defendants in the action, and judgment was entered for the defendants on a counterclaim by them for (amongst other relief) a sum of £13,384 13s. 9d. Two questions only were argued before their Lordships' Board. They are unconnected, and may be dealt with separately.

The relevant facts upon which the first question is founded may first be stated. In July, 1928, the plaintiff Wright owned a farm called Cattle Peaks, which was subject to a first mortgage for £9,425. By memorandum of mortgage dated July 27, 1928, the plaintiff Wright mortgaged Cattle Peaks to the association, subject to the before-mentioned mortgage. By virtue of the Land Transfer Act, 1915, the mortgage of July 27, 1928, conferred upon the association a power of sale in the following terms :

The mortgagee may sell the mortgaged property, or any part thereof, either altogether or in lots, by public auction or by private contract, or partly by the one and partly by the other of such modes of sale, and subject to such conditions as to title or evidence of title, time or mode of payment of purchase money or otherwise as the mortgagee thinks fit, with power to the mortgagee to buy in the mortgaged property or any part thereof at any sale by auction or to rescind any contract for the sale thereof, and to resell the same without being answerable for any loss or diminution in price, and with power to execute assurances, give effectual receipts for the purchase money, and do all such other acts and things for completing the sale as he may think proper : And also that the mortgagee may exercise such other incidental powers in that behalf as are conferred upon mortgagees by the Land Transfer Act, 1915 : And, lastly, that the mortgagee will apply the moneys arising from any such sale as aforesaid, in the first place in payment of the costs and expenses incidental to the sale or otherwise incurred in respect of the mortgage, and in the second place in satisfaction of the principal interest and other moneys for the time being owing under the mortgage, and in the third place in payment of the moneys owing under subsequent registered mortgages (if any) in the order of their priority ; and will pay the surplus (if any) to the mortgagor.

By an agreement dated May 8, 1929, the power of sale being then exercisable, the association, as mortgagee, agreed to sell Cattle Peaks to one Little for the sum of £15,317 5s. The purchase money was to be paid as to £2,000 on the signing of the agreement. This was duly paid. The sum of £9,425 was to be paid by Little assuming liability for the first mortgage of that amount, and the balance of £3,892 5s. was to be paid on Mar. 23, 1934. Interest on the unpaid purchase money was payable by Little at the rate of 9 per cent. per annum. Little was given possession of the land, but no transfer of the property to him was ever effected. The agreement, however, provided that, if Little made default, the association might re-enter on the land, and (whether it had re-entered or not) resell the land. Little failed to carry out the contract, and the association rescinded the agreement with Little and sold Cattle Peaks to another purchaser, but for a price considerably lower than that payable under the first agreement. The second agreement has been carried to completion, and the land has been vested in the second purchaser. The second purchaser was in fact Little's wife, but nothing turns on this. Neither the propriety nor the validity of that sale is questioned.

The association has credited the plaintiff Wright with all moneys received from Little under the agreement of May 8, 1929, and with the full price for which the property was sold under the second agreement. The plaintiff Wright, however, is not satisfied. He claims that he is not concerned with the second sale, but that he is entitled to be credited with the whole of the price for which the property was contracted to be sold under the first agreement. The first question arising on this appeal is whether or not that claim is well-founded. **A**

It is to be observed that, in the present case, the mortgagee's power of sale authorised a sale "subject to such conditions as to . . . time or mode of payment of purchase money . . . as the mortgagee thinks fit," words wide enough to constitute an authority to the mortgagee from the mortgagor to sell on credit. This feature, however, appears to be of no materiality to the point under consideration. Its only importance lies in the fact that it makes it impossible for the mortgagor to contend that the contract with Little was in excess of the mortgagee's power. That he does not seek to do. Indeed, his whole contention is based upon the view that the contract constituted an effective sale under the power, and that the price payable thereunder must be credited to him by the mortgagee. **B** **C**

Their Lordships agree with both of the courts in the Dominion in rejecting this claim. They know of no principle, legal or equitable, upon which can rest the proposition that a mortgagee who has contracted to sell in exercise of his power of sale, and who (the land not having become vested in the purchaser) rescinds the contract, is accountable to the mortgagor for purchase money which he has never received. Authority is against such a proposition. The exact point has been decided, and their Lordships think rightly decided, by the courts, in New South Wales : *Irving v. Commercial Banking Co. of Sydney* (1). The case is patently different from those cases in which it has been held that a mortgagee, who sells upon the term that part of the purchase price shall remain on mortgage, is accountable to the mortgagor for the whole purchase money. In such cases, the contract has been carried to completion, the property has been vested in the purchaser, and the power of the mortgagor to get back his property freed from the mortgage has been, not merely suspended, but destroyed. The transaction is only consistent with the view that the whole purchase money was received by the mortgagee in the first instance, and subsequently, as to part, advanced by way of loan to the purchaser. Moreover the terms of the power of sale which is here in question negative the existence of the right claimed. **D** **E** **F** **G** **H**

The mortgagee's obligation as to the application of the sale moneys is only expressed to exist in relation to "the moneys arising from any such sale," and moneys which have never been forthcoming cannot be said to "arise" at all. Further, the power includes a power in the mortgagee to rescind and resell "without being answerable for any loss or diminution in price." Such a provision seems inconsistent with the view that

he is answerable for the larger price. Their Lordships feel no doubt that the plaintiff Wright's first contention must fail.

The facts relevant to the second point must now be stated. By a guarantee in writing dated Aug. 11, 1909, the plaintiff Wright guaranteed to the association payment by two sheepfarmers named Nosworthy of
A their indebtedness to the association in the following terms :

In consideration of your supplying goods and making advances to William Nosworthy and Robert Nosworthy both of Mt. Somers, sheepfarmers, I, Douglas George Wright of Windermere, sheepfarmer, hereby agree with you as follows :

1. To guarantee to you the payment by the said William Nosworthy and Robert
B Nosworthy of all goods already supplied or hereafter supplied by you to them and of all advances already made or hereafter made by you to them together with interest thereon at the current rate charged by you and together with such charges as are usually made by you.

2. This guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the said William Nosworthy and Robert Nosworthy on their current account with you for goods supplied and advances made by you as aforesaid and interest and other
C charges as aforesaid.

3. You shall be at liberty without discharging me from liability hereunder to grant time or other indulgence to the said William Nosworthy and Robert Nosworthy in respect of goods supplied and advances made by you to them and the interest thereon and other charges as aforesaid and to accept payment from them in cash or by means of negotiable instruments or otherwise and to treat them in all respects as though I were jointly liable with them as a debtor instead of being merely a surety for them. You shall also be at liberty to take any securities you may think
D fit from the said William Nosworthy and Robert Nosworthy for the purpose of securing payment of the moneys which I hereby guarantee to pay and such securities at your own discretion to release and discharge or otherwise deal with.

4. In order to give full effect to the provisions of this guarantee I hereby waive all suretyship and other rights inconsistent with such provisions and which I might otherwise be entitled to claim and enforce.

By letter dated Apr. 25, 1931, the plaintiff Wright terminated his
E guarantee. The balance due on that date by the Nosworthys to the association was the sum of £11,816 10s. 4d. The account was ruled off in the association's books at that figure, and all subsequent debits and credits to the Nosworthys were entered in a fresh account called the L.A. account. The Nosworthys having made default, the association
F counterclaimed in the action for payment by the plaintiff Wright of the sum of £11,816 10s. 4d., with interest thereon. The plaintiff Wright pleaded that the claim was barred by the Limitation Act, 1623, or, in the alternative, by the Civil Procedure Act, 1833, his contention being that, upon the authority of the decision in *Parr's Banking Co. v. Yates* (2),
G his liability as guarantor was barred in respect of each advance made to the Nosworthys on the expiration of 6 years from the date of the advance. The second question to be decided is whether that contention is sound. The trial judge held that it was not, and entered judgment for the association for £13,384 13s. 9d. in respect of the guarantee, representing the sum of £11,816 10s. 4d. and interest to judgment, after taking
H into account a credit existing on the L.A. account. The appeal from that judgment was dismissed. Their Lordships agree with those decisions. In their opinion, the matter is determined by the true construction of the guarantee which they proceed to consider, and, in the first instance, apart from authorities. It is no doubt a guarantee that the association

will be repaid by the Nosworthys advances made and to be made to them by the association, together with interest and charges, but it specifies in cl. 2 how that guarantee will operate—namely, that it will apply to (that is, the guarantor guarantees repayment of) the balance which at any time thereafter is owing by the Nosworthys to the association. It is difficult to see how effect can be given to this provision except by holding that the repayment of every debit balance is guaranteed as it is constituted from time to time, during the continuance of the guarantee, by the excess of the total debits over the total credits. If that be the true construction of this document, as their Lordships think it is, the number of years which have expired since any individual debit was incurred is immaterial. The question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted. A

It is said, however, that the decision in the *Parr* case (2) is inconsistent with this view, and excludes its entertainment. In that case, there was in terms no guarantee of every debit balance existing from time to time, nor does the clause as to evidence, which appears in the LAW JOURNAL report, operate to create such a guarantee. There had been no debits to the account of the guaranteed party, except debits of interest and charges, since Dec. 3, 1890, but payments to its credit had been made down to Mar., 1897, or Apr., 1897, when the guaranteed party disappeared. The writ was issued on Sept. 3, 1897. Counsel for the plaintiff argued that, on the true construction of the guarantee, it did guarantee payment of whatever was from time to time due on the account of the principal debtor, and that what was sued for was the guaranteed payment of the balance due in 1897. As their Lordships read the judgments, the Court of Appeal refused to accept that construction of the guarantee there in question. They construed it as a guarantee of the repayment of each individual item debited to the guaranteed party, whether in respect of advances, interest, commission or other charges. Thus A. L. SMITH, L.J., said as to the guarantee, at pp. 464, 465 : B

... upon the true construction of it, no advances having been made for a period of more than 6 years before the date of the writ in the action, the plaintiff's right of action in respect of the advances is barred by the Statute of Limitations. C

However, he held the defendant bound to pay the interest, commission and charges, the repayment of which had also been guaranteed, because they had accrued against the guaranteed party within the 6 years. RIGBY, L.J., also rejected the construction which gave a fresh right of action from day to day. In other words, he rejected the construction that the repayment of balances was guaranteed. VAUGHAN WILLIAMS, L.J., also rejected that construction in holding that, under the guarantee, the cause of action arose as to each item, whether principal, interest, commission or other banking charge, as soon as that item became due. Their Lordships express no opinion whether that particular decision was right or wrong. They would wish to keep that question open for further D

consideration, should the necessity to determine it ever arise. They are, however, satisfied that it has no application to the rights and liabilities of the parties to the guarantee which is under examination on this appeal. That document, in their opinion, clearly guarantees the repayment of each debit balance as constituted from time to time, during the continu-

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ance of the guarantee, by the surplus of the total debits over the total credits, and, accordingly, at the date of the counterclaim, the association's claim against the plaintiff Wright for payment of the unpaid balance due from the Nosworthys with interest was not statute-barred. It is not necessary to decide the exact point of time from which the limitation period

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would commence to run in a case such as this, because no claim was made before their Lordships to alter the amount of the judgment on the guarantee, in the event of the contention as to the Statutes of Limitation being unsuccessful. For the reasons indicated, their Lordships are of opinion, and they will humbly advise His Majesty, that this appeal should be

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dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors : *John Bailey, Le Mesurier & Watts-Jones* (for the appellants) ; *Gard, Lyell & Co.* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

STOCKLEY v. STOCKLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
E **April 3, 25, 1939.**]

Divorce—Desertion—Separation agreement—Provisions for access to child not fulfilled—Repudiation of agreement.

The respondent deserted the petitioner in Dec., 1931, and thereafter the petitioner, primarily on account of the child of the marriage, entered into a separation agreement whereby he agreed to pay a weekly sum for the support of the respondent and the child. The agreement provided that the petitioner should have access to the child at places he should reasonably select, and at least once a week. Thereafter the respondent made various excuses for not allowing the petitioner access to the child, and in 27 weeks he saw the child only about 12 times, and then for a few minutes and in the presence of the respondent at places selected by her. In Aug., 1932, alleging that there had been a breach of the agreement for access, he withheld further payments under the agreement, and the wife thereafter refused to allow him to see the child. She also refused an invitation which he made to return to him and start again. The present petition for divorce alleged desertion for a period of 3 years prior to the presentation of the petition :—

H HELD : (i) the provision in the separation agreement as to access was a condition which went to the root of the contract, and the respondent by her action had committed a breach of this fundamental condition.

(ii) the petitioner accepted the breach as a repudiation of the agreement by the respondent, and, as the respondent thereafter had categorically refused to return, the petitioner was entitled to a decree on the ground of desertion.

[EDITORIAL NOTE.] A separation deed is a bar to proceedings based on desertion unless the deed has been repudiated by one party and that repudiation accepted as such by the other party. In considering a question of repudiation, it is necessary to distinguish between matters which are fundamental and go to the root of the contract and those which are not so essential. It is here held that the provisions relating to access to a child of the marriage are fundamental and a breach of them is a repudiation of the deed. A

AS TO DESERTION AND SEPARATION DEEDS, see HALSBURY, Hailsham Edn., Vol. 10, p. 657, para. 966; and FOR CASES, see DIGEST, Vol. 27, pp. 317, 318, Nos. 2940-2956.]

UNDEFENDED PETITION by the husband for dissolution of marriage on the ground of desertion. The facts are fully set out in the judgment. B

R. H. Glyn for the petitioner.

HENN COLLINS, J.: The facts of this case are as follow. The wife in the first instance deserted the husband somewhere about Dec. 16, 1931. Thereafter, actuated primarily by consideration for the child of the marriage, then barely a year old, the husband entered into a separation agreement, which was in the usual form so far as material to the present case. It contained a clause whereby the husband was to pay a weekly sum towards the support of the wife and another sum towards the support of the child. It provided by cl. 5 that the husband should have access to the child of the marriage for such time and at such places as the husband should reasonably select at least once a week. Having entered into that agreement, the wife made various excuses for not allowing the husband access to the child. When I say excuses, I mean exactly what I say—unfounded objections to giving the husband the access to which he was entitled. In some 27 weeks he succeeded in seeing the child only about a dozen times, and then apparently only for a few minutes, and in the presence of the wife. He regarded that, and I think he was right in so regarding that, as not the kind or extent of access to which he was entitled under the agreement. Thereupon on Aug. 12, 1932, his solicitor, on his instructions, wrote to the wife's solicitor setting out the facts, and continued as follows: C
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My client contends that this is a distinct breach of the terms of the access clause contained in the agreement of Jan. 18, 1932, and accordingly instructs me to say that entirely without prejudice to the rights to which he is strictly entitled, he feels he has no alternative but to withhold all future payments for maintenance under the agreement until such time as a judicial decision is obtained as to the interpretation of the access clause, or until your client is willing to carry out the full intention of such agreement. G

To that letter the wife's solicitor, having previously asserted that his client was acting within her rights under the agreement, replied as follows: H

If the payments are stopped, then my client will certainly take such proceedings as she may be advised.

The first question I have to ask myself, I think, is whether the obligation of the wife to permit access is one of those conditions which

- go to the root of the contract from the husband's point of view. About that, I have no doubt that it is such a fundamental undertaking. Was the action of the wife, as I have described it, a breach of the agreement? I have not the least doubt that it was. In so far as she allowed access at all, she constituted herself the arbiter of the time that the access
- A should last, and of its conditions, and she insisted on herself being present. That being so, there was a breach by her of a fundamental condition of the agreement. The next question is whether or not the husband accepted that breach as a repudiation of the agreement by the wife. As to that, it seems to me to be quite clear on the terms of his solicitor's letter that
- B what he is saying is this: "I am not going to perform the most important undertaking on my part—that is, the payment—unless you are prepared to perform yours." Thereupon the wife did not amend her ways, and did not carry out the threat which her solicitor had adumbrated of taking proceedings.
- C In those circumstances, I think that the proper inference is that the wife repudiated the agreement and the husband accepted that repudiation as putting an end to it. The spouses met a month or so later, and thereupon the wife, not having chosen to test her legal position, simply refused to allow the husband to see the child again. If there were not
- D already a repudiation of the agreement, that clearly was. Upon that, the husband said, as indeed his solicitor had already said: "I am not going to pay." He also said: "If you choose to come home now, or at any time, we can start again." The wife, however, refused to come. In those circumstances, it seems to me that, for the reasons I have
- E already given, there was an accepted repudiation of the agreement before that interview—that is to say, at or about Aug. 12 or Aug. 15 when that letter was written by the husband's solicitor—or, if not at that time, then a month later, when the wife categorically refused to allow the husband to see the child again. Then comes the question
- F which may be a very difficult question in some cases: There having been a separation agreement which has come to an end while the parties are living apart, one of them institutes a suit for desertion. Has the petitioner, in such a case, proved that he or she was really amenable to the terms before he or she can establish desertion, or did a state of
- G desertion supervene when the agreement came to an end? I do not think it is right that I should express a view upon that, which would be *obiter*, and therefore of no great guidance. However, I can quite well see circumstances in which, if one tested the matter by the system of common law, there would be an obligation generally on the
- H part of the husband to support the wife and in which the failure to do so would be a fact of which the wife could complain. Here, however, I am not embarrassed by any such question, because there is a categorical refusal on the part of the wife to return, and no circumstances, as I see it, justifying the fact. From that moment, to my mind, the desertion began, and it has continued ever since. That date being more than

3 years before the date of the petition, I find the petition as a fact proved, and pronounce a decree.

Decree nisi granted.

Solicitors: *Walmsley & Stansbury*, agents for *E. W. Marshall, Harvey & Dalton*, Poole (for the petitioner).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

Distinguished. R. v. TORQUAY
LICENSING JJ. *Ex p.* BROCKMAN.
[1951] 2 All E.R. 656.

R. v. ROTHERHAM LICENSING JJ., *Ex parte* CHAPMAN.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Lewis, JJ.), May 5, 1939.]

Intoxicating Liquors—Occasional licences—Exercise of discretion—General rule of justices restricting number of such licences to same applicant in any one year to two—Whether rule illegal—Licensing (Consolidation) Act, 1910 (c. 24), s. 64.

A general rule was decided upon by licensing justices that the number of occasional licences granted to the same promoters should not exceed two in any one year commencing on Apr. 1 and ending on Mar. 31, and that an interval of at least 3 months must elapse between the granting of any two such licences:—

HELD: (i) the rule involved the abdication of the justices' duty impartially to consider upon the particular facts the merits of each individual application, provided in advance the opportunity of declining jurisdiction in a particular case, and was calculated to clog and to fetter the performance of that duty.

(ii) it was the duty of justices to hear and determine every application according to law, and not according to some fixed rule or principle.

[EDITORIAL NOTE.] Where a discretion is given to justices or to any other tribunal the making of a general rule as to the manner in which that discretion will be exercised is inconsistent with the judicial exercise of that discretion. The existence of the discretion requires that the tribunal shall consider each individual case upon its own facts. This, however, does not operate to prevent the formation of a general practice, so long as no hard-and-fast rule to be applied indiscriminately is formed.

AS TO OCCASIONAL LICENCES, see HALSBURY, Hailsham Edn., Vol. 19, p. 115, para. 271; and FOR CASES, see DIGEST, Vol. 30, pp. 73, 74, Nos. 583-588.]

Case referred to:

(1) *R. v. Holborn Licensing JJ., Ex p. Stratford Catering Co., Ltd.* (1926), 136 L.T. 278; Digest Supp.

APPLICATION for an order of *mandamus* that the licensing justices for the borough of Rotherham in Yorkshire do hear and determine according to law the application made by one Arthur Chapman to the justices on Jan. 19, 1939, for an occasional licence in respect of a dance to be held in Rotherham. The facts are set out in the judgment of LORD HEWART, L.C.J.

J. Willoughby Jardine, K.C., and *Clive Salter* for the applicant.
Christmas Humphreys for the respondents.

LORD HEWART, L.C.J.: The facts of this case are capable of very brief statement. The applicant is a licensed victualler carrying on business

- at a certain hotel in Sheffield, and for some years past he has from time to time applied to the licensing justices for the borough of Rotherham for occasional licences to sell intoxicating liquors. Those licences, we are told, have been granted in respect of dances and other entertainments organised by what is called the social services of Messrs. Steel, Peech & Tozer, Ltd., who provide those services for the benefit of their employees, who number nearly 6,000, and those applications, it is said, have always been granted. On Nov. 24, 1938, that company applied to the justices for an occasional licence, and were informed that the justices had decided upon a new rule, which was to be of general application—namely, that the number of occasional licences granted to the same promoters should not exceed two in any one year, commencing on Apr. 1 and ending on Mar. 31, and, more than that, that an interval of at least 3 months must elapse between the granting of any two such licences. I pause to say that this document is inartistically drawn.
- C It is quite obvious that the application was not made by the limited company. The application must be made by the holder of a licence, and no doubt that is what is intended, although it is not what is expressed. The application was made, it is said, the subject of an exception to the rule which had been adopted by the justices, and that exception was
- D permitted. Afterwards, on Jan. 12, another application was made, on behalf of that company, in regard to a dance to be held on Mar. 2, and that was the application to which reference is made in the request for a *mandamus*. On Mar. 2, the statement says, the justices informed Mr. Taylor, the secretary of the social services of the limited company already
- E mentioned, that the matter of the granting of such licences had been already settled, and they referred to the new rule. On Jan. 19, 1939, there followed an application by a licence holder, the applicant for the present rule, for the grant of a licence in respect of Mar. 2. He submitted that the so-called new rule was illegal, and ought to be no bar to his
- F application, and that the justices were bound to hear and determine the application in accordance with law, and added, by way of make-weight, that in any event the applicant on the merits should be treated as an exception to the rule. Having heard that evidence, the justices, we are told, heard no opposition from the police or other parties, but never-
- G theless refused the application without stating any reasons. Two days later, according to the statement of the applicant, the justices gave a general warning to applicants for occasional licences that there must be no attempt to evade, by the splitting up of organisations, their rule already mentioned, and that any such evasion would result in the
- H refusal altogether of all applications for occasional licences. I have been summarising, and to some extent repeating, the statements and arguments contained in the statement verified by affidavit on behalf of the applicant for the rule, but there is also before us an affidavit by the chairman of the justices. It is, not to use too harsh a phrase, a somewhat unusual document. It would be a waste of time to criticise the mere

vocabulary of it, or to call attention in a spirit of possibly humorous criticism to some of the phrases which occur, are varied, and, with variations, are reiterated. The document has been read, and I refrain from reading it again. Undoubtedly there are passages in it well calculated to provoke one's sense of humour, but, when one disengages the substance of the matter from some of the fringe which surrounds it, it does, I think, clearly appear from this affidavit that, whether the term "rule" or the term "principle" be adopted, and whether such epithets as "inflexible" or "invariable" be accepted or put aside, the justices did come to a decision at a special meeting to the effect that the number of applications by any one organisation—or, to be accurate, on behalf of or with reference to any one organisation—should be reduced to what is called a quantity which might reasonably be regarded as occasional. Those words are manifestly vague. Then the chairman goes on to say that this principle, as he calls it, or rule, as he sometimes calls it, was that, in considering applications for occasional licences, the justices should seriously challenge the existence of special circumstances whenever an application was made on behalf of the same organisation on more than two occasions in any period of 12 months. On the other hand, this chairman of the justices swears that at no time did he and his colleagues agree to exclude from their consideration the existence of exceptional circumstances. It is probably a mere matter of phraseology, but there seems a point of contrast between "exceptional circumstances" and "special facts." At no time did they agree to exclude from their consideration the existence of exceptional circumstances which might induce the justices to waive the operation of this rule. In the same affidavit, the chairman of the licensing justices goes on to repeat the phrase "the formulation of this principle," and to suggest reasons for its use. It would be a waste of time to criticise minutely the alleged reasons, but it is curious that one should find in this affidavit, which was vital from the point of view of the licensing justices, such words as these :

It is not true that on Jan. 12, 1939, the justices informed the said Harry Taylor that, by reason of the rule aforesaid, the matter of granting such licences had been already settled, save in so far as the principle as above set out had been agreed by the justices.

That seems to be a rather verbose way of saying or suggesting that the rule was not to be applied except in so far as the justices had agreed to apply it. The chairman goes on to say that on Jan. 12 and Jan. 19 he and his colleagues carefully listened to all the facts and arguments, and, in the proper exercise of their discretion, refused the application. Unfortunately, that paragraph is followed by a somewhat eloquent paragraph, which is in this interesting form :

In arriving at this decision we were impressed by the answer given by the said Harry Taylor, when asked what was the special requirement for a liquor licence, to the effect that "a dance cannot be made to pay without a bar." My fellow justices and I were of opinion that the purpose of an occasional licence is to add a reasonable amenity to an already planned function, and not to provide the promoters of the function with a means of making money from the sale of liquor in order to offset

the financial loss incurred in running the function without such an additional amenity.

I am far from believing that I fully comprehend the meaning of that eloquent passage, but it certainly does appear to the ordinary reader to convey the meaning that the justices had formed the opinion that the function of the occasional licence which was asked was rather to make money from the sale of beer than to fulfil the legitimate purpose for which an occasional licence might be granted.

The law relating to the granting of occasional licences is to be found in the Licensing (Consolidation) Act, 1910, s. 64. The first part of that section provides as follows :

(1) An occasional licence shall not be granted except with the consent of a petty sessional court, and unless 24 hours at least before applying for that consent the applicant has served on the superintendent of police for the district notice of his intention to apply for the consent, setting out his name and address, the place and occasion in respect of which the licence is required, the period for which the licence is to be in force, and the hours to be specified in the consent of the justices.

By subsect. (4) of that section it is provided as follows :

For the purposes of this Act an " occasional licence " is a licence for the sale of intoxicating liquor granted under the authority of the Commissioners of Customs and Excise in pursuance of the Revenue Act, 1862, s. 13, the Revenue Act, 1863, s. 20, and the Revenue Act, 1864, s. 5.

I refrain from referring again to the inartistic way in which the application was framed and presented. It is quite obvious that it is the licence holder who must get the occasional licence, and it is quite obvious what are the obligations of the occasional licence when it is granted.

To return to the substance of this matter, which I think, can be fairly disengaged from the mass of words in which the substance has come to be contained or concealed, it is quite obvious, to my mind, that these justices, no doubt under a sense of duty, and under the belief that they were faithfully performing their duty, did prescribe for themselves something, whether it be called a rule or whether it be called a principle, which was to define for the future the limits within which alone applications for an occasional licence would be granted. They appear to have come to the conclusion that, where an application was made with reference to a particular organisation, they were entitled to say beforehand, and to say in a stereotyped formula : " There shall be no more than two in any one year, and, with regard to those two themselves, there shall be an interval of 3 months at least between one and the other." It may well be that justices of discretion and experience might prescribe for themselves a general rule of that nature as a counsel of perfection, intending, and being able, to apply an unfettered discretion to the consideration of the merits of each particular case. The rule itself, however, or the principle, if that word be preferred, seems plainly designed to prevent the application of an unfettered judgment to the individual case, and to prescribe in advance a hard-and-fast rule, save in exceptional circumstances—a phrase to which the Licensing Act itself in this connection is a stranger—and so exclude any more

than two applications with reference to what is called the same organisation in the course of 12 months. That seems to me to be an abdication of the duty of the justices impartially to consider upon the particular facts the merits of each individual application. No doubt the justices came to the conclusion that there were too many applications of the kind. No doubt they came to the conclusion that they should regard with a jealous and careful eye all applications of the kind. Nevertheless, it is one thing to have that opinion, and it is another thing to lay down a rule or principle that two applications must end the matter for the period of a year, so far as any particular body is concerned. It seems to me that that is providing, and providing in advance, the opportunity of declining jurisdiction in a particular case, not applying ostensibly to each particular case an impartial mind, and merely providing for the application of a rigid formula. A
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Our attention has been invited to *R. v. Holborn Licensing JJ., Ex p. Stratford Catering Co., Ltd.* (1), a case dealing with a very different subject-matter, where the justices thought that it was right to suggest a term of 3 months rather than one month for a period of notice to a manager. If that case is read with any care, it is quite obvious that the particular facts and circumstances of each case were intended to be, and were in fact, regarded. I think that that case is rather an illustration of the right method by contrast to that which is shown in the present case—namely, the wrong method. I repeat that I have not the least doubt that these justices had no intention but the due performance of the public duty with which they had been entrusted, but they adopted a scheme or a method well calculated to clog and to fetter the performance of that duty, and quite certain to be misunderstood by the public to whose knowledge it was brought. I think that there is no escape from the conclusion that there must be an order of *mandamus* to these justices to hear and determine this according to law, which is a very different thing from hearing and determining it according to some fixed rule or principle, whether or not it may deserve such epithets as “invariable” or “inflexible.” C
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I think, therefore, that this order of *mandamus* should be made.

HUMPHREYS, J.: I also agree that the justices in this case should be ordered to hear and determine the application for an occasional licence according to law. I think that it is useful to observe the meaning of the expression “an occasional licence.” An occasional licence was originally a licence granted under the Revenue Act, 1862, s. 13, which provides that it shall be lawful for the Inland Revenue Commissioners, whenever they shall consider it conducive to public convenience, comfort and order, and with the consent in writing of two justices of the peace, to authorise an officer of excise to grant to any person who is duly authorised to keep a common inn, alehouse or victualling house, a licence which is to be called an occasional licence. That Act of Parliament was slightly altered by the Revenue Act, 1863, which provided, amongst other things, that, G
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while the hours during which an occasional licence might operate by the terms of sect. 13, to which I have referred, should be invariable in regard to all other functions, upon the occasion of any public dinner or ball the hours might be any hours in effect considered reasonable by the justices, and specified in the order. Then by the Licensing (Consolidation) Act, A 1910, s. 64, the alteration, and the only material alteration, which was made was that an occasional licence is directed only to be granted with consent of a petty sessional court, and there is a provision that, in the case where a petty sessional court is not sitting, and application cannot conveniently be made to it, the application may still be made to two B justices. Having regard to the words which I have read from sect. 13 of the Act, I entertain grave doubt whether justices, whether sitting as a petty sessional court or in any other capacity, have a right to make any general rule which will fetter the decision of themselves or other justices in regard to the granting of this application. I by no means desire to C whittle away the powers which, in my opinion, the licensing justices undoubtedly possess to make certain general rules, an instance of which is to be found in the facts of the case which has been referred to, *R. v. Holborn Licensing J.J., Ex p. Stratford Catering Co., Ltd.* (1), but in regard to these occasional licences, seeing that they are to be granted subject to D the consent of two justices by those who are, in effect, the officers of excise, and with the approval of the Inland Revenue Commissioners, whenever they shall consider it conducive to public convenience, comfort or order to do so, I myself very much doubt whether the justices ought to say in advance, or have power to say in advance: "We shall consider it not E conducive to public convenience, comfort or order in certain circumstances." I think it is essentially a matter in which every application must be dealt with upon its own particular facts, and, for that reason, I should, if necessary, be prepared myself to hold that any general rule stating in advance upon what occasion, or what number of occasions, F the justices would grant occasional licences would be illegal, as fettering, or tending to fetter, the discretion of the particular justices sitting to whom such an application might be made.

Upon the facts of this case, I entirely agree with the judgment which has been delivered by my Lord. I think that it is plain that in fact these G justices did not consider the merits of the particular application, but regarded themselves as being required to start their consideration of this case by paying attention to a rule that normally there should be only two, and no more, grants of occasional licences to the same applicant, as he was called. That is not what is meant in the least. It means that no more H than two licences shall be granted to any applicant in respect of an entertainment or entertainments promoted by the same promoter. That is what is meant. It is unnecessary that I should add anything further to the judgment of my Lord, which entirely expresses my view of the facts of this case. I would only like to repeat that I take the view which my Lord has expressed that the justices in this case were acting in what they

fully believed was the discharge of their duty in the matter. However, I think that they were mistaken.

LEWIS, J. : I agree, and have nothing to add.

Order of mandamus made, with costs.

Solicitors : *Jackson & Jackson*, agents for *J. W. Fenoughty, Dunn & Co.*, A
Rotherham (for the applicant); *Sharpe, Pritchard & Co.*, agents for
C. L. des Forges, Town Clerk, Rotherham (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

VERNON v. FINDLAY.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), May 1, 1939.]

*Contract—Necessity for writing—Contract not to be performed within a year—
Contract to procure employment at yearly salary—Statute of Frauds, 1677 (c. 3), s. 4.* C

The defendants, intending to promote a company to manufacture typewriters under a patent, offered the plaintiff a position with the company when it should be formed at a salary of £350 per annum and commission. It was part of the arrangement that the plaintiff was to resign from his existing employment. He duly resigned, and worked for the defendants for about 3 months. The plan to form the company fell through, and the plaintiff brought this action for breach of contract. The defendants contended that this was a contract not to be performed within a year, and was unenforceable as there was no memorandum in writing:— I

HELD: the contract was not a general hiring for a year, but an agreement to procure an appointment for the plaintiff, and was one which could be performed within a year. The defence under the Statute of Frauds, therefore, failed. E

Decision of LEWIS, J. ([1938] 4 All E.R. 311) reversed on the facts.

[EDITORIAL NOTE.] The Court of Appeal have here taken a different view of the facts, and it is from that different view of the facts that the different conclusion in law results. F

AS TO CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR, see HALSBURY, Hailsham Edn., Vol. 7, p. 110, para. 156; and FOR CASES, see DIGEST, Vol. 12, pp. 123-125, Nos. 806-828.]

Cases referred to :

- (1) *De Stempel v. Dunkels*, [1938] 1 All E.R. 238; Digest Supp.; 158 L.T. 85. G
- (2) *Hanau v. Ehrlich*, [1911] 2 K.B. 1056; 30 Digest 194, 618; 81 L.J.K.B. 162; 105 L.T. 320; on appeal, [1912] A.C. 39.

APPEAL by the plaintiff from a judgment of LEWIS, J., dated Nov. 2, 1938, and reported [1938] 4 All E.R. 311, where the facts are fully set out.

J. P. Eddy, K.C., and *B. L. A. O'Malley* for the appellant.

H. St. John Field, K.C., and *Wilfrid Bennett* for the first respondent.

C. Gallop for the second respondent.

Eddy, K.C. : The judge was wrong in thinking that the facts here raised any of the questions debated in *De Stempel v. Dunkels* (1). The contract here was clearly one which might be performed within a year. H

That was the intention and expectation of the parties. [He was stopped by the court.]

A *Field, K.C.* : It was the fact that the plaintiff's counsel insisted on the relevance of the *Dunkels* case (1) which caused the judge to consider that case. The true construction of the contract is as alleged in the statement of claim. Either it is that or it is no contract at all. It was merely a promise on a condition which never happened. It is not suggested that the plaintiff can give any further evidence. The court is in a position to deal finally with the case.

B *Gallop* : I am not asking the court to deal with the case on the footing that the evidence was completed. The judge was right in holding that the Statute of Frauds applied. To have held otherwise would have been to render the statute wholly inoperative in this sort of case. In cases dealing with the sale of land, the statute has been held to apply to an agreement to procure the sale of land by the owners. By analogous **C** reasoning, the statute should be applied to an agreement to procure a contract which would be for longer than a year. [Counsel referred to *Hanau v. Ehrlich* (2).]

D *Scott, L.J.* : In this appeal, in my view, the judge has taken a view of the contract sued on by the plaintiff which led him into thinking that the Statute of Frauds would be an effective answer to the action, whereas the contract was not within the statute. The two defendants agreed that, if the plaintiff would terminate his existing employment, they would form and register a new company, and would procure the plaintiff **E** an appointment as sales manager at a salary of £350 per annum. The plaintiff now asks for damages for breach of this contract. In my opinion, the evidence sufficiently substantiates the contention that that *prima facie* case was made out. The defendants pleaded that the contract so made was one which could not be performed within a year **F** and that therefore the statute applied. The answer to that was that the contract was one which, by its terms, could be performed within a year, and that therefore the Statute of Frauds would have no application. The judge took the view that the contract was one for the employment of the plaintiff for one year from Jan. 1, 1937, **G** but did not decide that the contract which was pleaded and proved was not to be performed within a year. It is thus clear that his conclusion that this was a contract to which the statute applied, was arrived at under a misapprehension.

H The case must, therefore, be sent back for a new trial, because the judge took the view that there was no case by reason of non-compliance with the statute.

As to the cross-appeal by the second defendant because the judge deprived him of his costs, for the reason that he had not pleaded the statute, and that he had, in consequence, to ask for leave to amend at the hearing, that was a decision as to costs.

As leave to appeal was not asked for, there can be no appeal as to that. The appeal is allowed with costs here to be paid to the appellant.

CLAUSON and GODDARD, L.JJ., agreed.

Appeal allowed with costs. Cross-appeal dismissed with costs. Costs of first trial reserved to the judge at new trial.

Solicitors : *Scott Duckers & Co.* (for the appellant) ; *Gamlen, Bowerman & Forward* (for the first respondent) ; *Forsythe, Kerman & Phillips* (for the second respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

DONOVAN v. NATIONAL AMALGAMATED APPROVED SOCIETY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Lewis, JJ.), **May 11, 1939.**]

Work and Labour—National health insurance—"Insured person"—Widow's right to pension—Proof that insured person "available for but unable to obtain employment"—Franking of contribution card at labour exchange—"Conclusive evidence of genuine unemployment"—National Health Insurance Act, 1924 (c. 38), s. 3 (3) (a) (b)—National Health Insurance Act, 1928 (c. 14), s. 1 (3)—National Health Insurance (Arrears) Regulations, 1930—Circular A.S. 267.

The appellant's husband became insured as an employed contributor under the National Health Insurance Act, 1911, on July 15, 1912, and was admitted to membership of the respondent society. He paid contributions until Mar. 29, 1931, and the society terminated his insurance on Dec. 31, 1932. He died on July 8, 1935, and his widow, the appellant, applied for a widow's pension under the Widows', Orphans' and Old Age Contributory Pensions Acts. However, her application was rejected by the Minister of Health on the ground that her late husband was not, at the time of his death, an "insured person," which was a condition of her right to a pension. An appeal to a referee was dismissed, and the Minister refused to review his decision, it being maintained that "insured" for the purposes of the Pensions Acts meant "insured" under the National Health Insurance Acts. For the period during which the husband was available for, but unable to obtain, employment, he took his health insurance card to the local employment exchange each week, where the card was "franked" with an impressed stamp by an officer of the Ministry of Labour, thereby indicating that the officer was satisfied that the husband was available for, but unable to obtain, employment in that week. There was an arrangement between the Minister of Health and the Minister of Labour whereby health insurance cards could be franked at the employment exchange. According to a regulation of the Ministry of Health, "the franking can normally be accepted by the society as conclusive evidence of genuine unemployment during the week to which it relates." An arbitrator held that the burden of proof required by the Act had not been discharged by the appellant, and that the respondent society rightly determined the husband's insurance on Dec. 31, 1932 :—

HELD : the proof given to the employment exchange by the appellant's husband that he was available for, but unable to obtain, employment was sufficient proof of availability for, but inability to obtain, employment, as required by the Act of 1924 as amended, so as to make him an insured person and entitle the appellant to a widow's pension.

[EDITORIAL NOTE.] The question here is the extent of the proof to be given by an insured person that he was available for, but unable to obtain, employment. The various parties concerned in the administration of the Act have made certain rules regulating the method of such proof, and it is held that, if the insured person, carrying out the provisions of those rules, proves to the satisfaction of the proper officers concerned such availability and inability, then the fact of such availability and inability is established, not only as against the Minister, but also as against all other bodies administering the national health benefit under the Act.

AS TO TEMPORARY UNEMPLOYMENT, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, p. 916, para. 1620; and FOR CASES, see DIGEST, Vol. 44, pp. 1308-1311, Nos. 140-154.]

SPECIAL CASE stated by a referee pursuant to the Arbitration Acts, 1889-1934, as applied by the National Health Insurance (Approved Societies) Regulations, 1938, in an appeal from an arbitrator appointed under the National Health Insurance Act, 1936, s. 163.

The appellant, Clara Donovan, was the widow of Nicholas Donovan, who died on July 8, 1935. He had been a member of the respondent society since July 15, 1912, and had paid contributions under the National Health Insurance Act, 1911, until Mar. 29, 1931. The respondents terminated his insurance on Dec. 31, 1932. After his death, the appellant applied for a widow's pension under the Widows', Orphans' and Old Age Contributory Pensions Act. This application was rejected on the ground that her husband had not been, at the time of his death, an "insured person," for the purposes of the Pensions Acts. An appeal to the referee was dismissed, it being held that the word "insured" meant "insured" under the National Health Insurance Acts. On Nov. 4, 1936, an application was made without success to the Minister of Health to review that decision. The question was later dealt with by an arbitrator appointed under the National Health Insurance Act, 1936, s. 163, with the consent of Mrs. Donovan and the society. The question before the arbitrator was whether Mr. Donovan was, at the date of his death, a member of the society for the purposes of national health insurance. A person who has been continuously insured for 10 years or upwards, if he proves that he is available for, but unable to obtain, employment, is to continue to be treated as an insured person. The question at issue was how proof should be made that the person in question was insured. For the period during which the husband had been available for, but unable to obtain, employment, he took his health insurance card to the local employment exchange each week, where the card was franked with an impressed stamp by an officer of the Ministry of Labour, thereby indicating that the officer was satisfied that the man was available for, but unable to obtain, employment in that week. There was an arrangement between the Minister of Health and the Minister of Labour whereby health insurance cards could be franked at the employment exchange. According to a regulation of the Ministry of Health :

The franking can normally be accepted by the society as conclusive evidence of genuine unemployment during the week to which it relates.

The arbitrator held that the burden of proof required by the Act had not been discharged by the appellant, and that the respondent society had rightly determined the husband's insurance. The widow appealed to a referee and the latter stated a case for the opinion of the court.

A. T. Denning, K.C., and *D. C. L. Potter* for the appellant.

Valentine Holmes for the Minister of Health.

The respondent society was not represented.

LORD HEWART, L.C.J. : This matter arose out of a dispute between the appellant, Clara Donovan, and the respondent society, the National Amalgamated Approved Society, as to whether or not the appellant's late husband, Nicholas Donovan, who died on July 8, 1935, ceased to be an insured person within the meaning of the National Health Insurance Act, 1936, or the enactments replaced by that Act, on Dec. 31, 1932. The appellant, says the referee, claims that her late husband's insurance did not terminate on that date. In accordance with the provisions of sect. 163 of the Act of 1936, the dispute was, in the first instance, decided by an arbitrator appointed under the rules of the National Amalgamated Approved Society. Afterwards, on appeal, the matter came before the referee under sect. 163 of the Act. At the hearing before the referee, a request was made on the part of the appellant, through her representative, that he should state a case on a question of law for the decision of this court. It is in those circumstances that this case stated comes into being.

After setting out with great care and precision the relevant sections of this somewhat complicated series of enactments and the relevant facts of the case, the referee sums up the question to be determined in the following words :

The question of law, for the decision of this honourable court is, whether on the true construction of the enactments applicable the proof of availability for but inability to obtain employment given by him during the period from Mar. 30, 1931, to May 25, 1935, to the Minister of Labour is such proof of availability for but inability to obtain employment as is required to be given by the said sect. 3 (3) (b) and sect. 3 (5) (a), (b) of the Insurance Act of 1924 as amended by the Insurance Act of 1928 and the Act of 1932.

In the course of the argument, the matter was brought to a point by the useful intervention of counsel for the Minister of Health, who made it quite clear that, although there is a considerable legal problem surrounding this case, the question really at issue is to be found within the limits of the words of sect. 3 (3) (a), (b) of the Act of 1924, as amended by the Act of 1928. That section provides as follows :

An insured person (a) who has been insured as an employed contributor for the prescribed period, and by or in respect of whom the prescribed number of contributions have been paid; and (b) who proves within the prescribed time that throughout the period during which he has remained insured by virtue of the foregoing provisions of this section (except when incapable of work by reason of some specific disease or bodily or mental disablement of which notice is given within the prescribed time) he was available for but unable to obtain employment within the meaning of this Act.

It is within those limits that the real area of controversy is now confined. Moreover, within that confined area, the question on further analysis proves to be this : is it true to say, regard being had to the enactments and to the facts, that there was here proof within the prescribed time, that the insured person was "available for but unable to obtain employment" within the meaning of that Act ? In other words, is it or is it not established that proof was given as required by sect. 3 (3) (b) of the Act of 1924, as amended by the Act of 1928 ?

A Our attention has been directed to the relevant statutes, and also to the National Health Insurance (Arrears) Regulations, 1930, in particular
 B reg. 4. Also, a document, which, as I think, is of the greatest importance, has been handed to us under the heading "National Health Insurance Act, 1928." It appears from that document, which is called Circular A.S. 267, that it was issued on behalf of the Ministry of Health for England and Wales, the Scottish Board of Health, and the Ministry of Labour
 C for Northern Ireland. On the last page of that document, p. 4, under the heading of "Appendix. Proof of Genuine Unemployment," there is a series of detailed provisions, explanations and exhortations, showing what may and ought to be done. In particular, there is a clear exposition of what must be done by an insured person in order that he may take
 D advantage of what are called the franking arrangements. Para. 3 in that part of the circular provides as follows :

In the ordinary case an insured person, who has proved his unemployment for a complete week (Monday to Sunday), can have his card franked for that week on producing it at the exchange on the day appointed for franking.

E Then there are some further provisions, and we come to para. 5, which provides as follows :

The franking consists of an impressed stamp on the appropriate week-space on the contribution card (or in cases under para. 4, on the slip). The stamp bears at the top the letters "N.H.I." [National Health Insurance] and at the bottom a variable cipher consisting of two letters and a figure, so that there will be a distinction
 F between the impressions made at different exchanges. The franking can normally be accepted by the society as conclusive evidence of genuine unemployment during the week to which it relates.

Those words, at any rate, are perfectly free from any possibility of ambiguity.

G Having regard to the statutory provisions, and having regard not least to the arrangements, as the case says, which have been made, and to this circular, counsel for the appellant made a very careful series of submissions on the essential question which is here raised. He submitted that the man proves his unemployment when he proves it
 H to a person having authority to receive the proof on behalf of the persons concerned, and that the persons concerned are the Minister of Health and the bodies who, under the supervision of the Minister of Health, administer the benefits of insurance—that is to say, first of all, the approved societies who administer sickness benefit, disablement benefit, and maternity benefit, next, the insurance committees who administer

medical benefit, and, lastly, the Minister himself, who administers the pensions benefit. Counsel for the appellant further argued that the Ministry of Health has authorised the local officer of the Ministry of Labour to receive proof of unemployment, and, by reason of that authorisation, proof to that officer is sufficient, not only so far as the Minister is concerned, but also so far as concerns the other bodies under him. The argument continued that, if the authority of the approved society is necessary, that authority also has been given. Counsel went on to argue that the effect of franking, to which this circular contains such clear reference, is to acknowledge by a duly authorised officer that proof of unemployment has been given to his satisfaction. Finally, it was contended that the surrender of cards to the approved society is only machinery, so as to enable the society to calculate the amounts of those benefits which it administers—namely, sickness benefit, disablement benefit and maternity benefit. The sum of the whole matter, counsel contended, is that the man proves his unemployment at the employment exchange, and the production of the franked cards is only evidence that he has already proved it, and not the proof itself. A

These words contained in para. 5 of the appendix to this Circular A.S. 267 seem to me to conclude whatever point was raised : B

The franking can normally be accepted by the society as conclusive evidence of genuine unemployment during the week to which it relates. D

I think that the contentions so ably marshalled and so clearly explained by counsel for the appellant are right. I agree with them. The question formulated by the referee is as follows : E

Whether on the true construction of the enactments applicable the proof of availability . . . to the Minister of Labour is such proof of availability for but inability to obtain employment as is required to be given by the Insurance Act, 1924, s. 3 (3) (b), (5) (a), (b), as amended by the Insurance Act, 1928, and the Act of 1932. E

I think that the answer to that question is that proof of availability and inability to the Minister of Labour is such proof as is contemplated by the enactments. It is in those terms and in that sense, I think, that the problem formulated by the referee ought to be answered. F

HUMPHREYS, J. : I agree, and I have nothing to add.

LEWIS, J. ; I agree. G

Appellant's claim upheld.

Solicitors : *McKenna & Co.* (for the appellant); *Solicitor to the Ministry of Health* (for the Ministry of Health).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.] H

ROBERTSON v. PETROS M. NOMIKOS, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Porter), **March 9, 10, 13, 14, May 9, 1939.**]

A *Insurance—Marine insurance—Freight—Agreement to pay if vessel a total loss—Cost of repairs greater than insured value of hull—Vessel worth more when repaired than insured value—No notice of abandonment—Whether constructive total loss—Marine Insurance Act, 1906 (c. 41), ss. 60, 61, 63 (2)—Institute Time Clauses (Freight), cl. 5.*

B The plaintiffs (the present respondents) had insured the freight of the Petrakis Nomikos with the defendant (the present appellant), a term of the contract being that the underwriters should pay in the event of a total loss, whether absolute or constructive. While the vessel was being repaired, an explosion occurred which caused extensive damage. The cost of repairs was more than the insured value of the hull, but, owing to the rise in the value of shipping, the owners had the repairs effected. As the freight had not been earned, the plaintiffs brought the present action, alleging that there had been a constructive total loss. The defendant argued that, as there had been no abandonment, and as no notice of abandonment had been given to the hull underwriters, there could not have been a constructive total loss:—

C HELD: as there was a constructive total loss of the ship by a peril insured against, and the insurance was against the happening of that event, the freight underwriters were liable.

D Order of Court of Appeal ([1938] 3 All E.R. 249) affirmed.

[EDITORIAL NOTE.] The matter here is a question of the construction of the Institute Time Clauses (Freight), cll. 5 and 8. These clauses have been separately considered in previous cases, but their combined effect has never before been the subject of discussion in the House of Lords. The question is whether underwriters be liable for loss of freight due to loss of time in the case of a constructive total loss, and upon this question the clauses are in conflict. The two possible constructions are that (i) in the case of a constructive total loss the underwriters pay in all cases, whether loss of freight be caused by loss of time or not or (ii) in no case will underwriters be liable where the loss of freight is caused by loss of time. The former construction is adopted.

F AS TO REPAIRED VALUE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 368, 369, paras. 529, 530; and FOR CASES, see DIGEST, Vol. 29, pp. 278-280, Nos. 2256-2269.]

Cases referred to:

- G** (1) *Carras v. London & Scottish Assurance Corpn., Ltd.*, [1936] 1 K.B. 291; Digest Supp.; 105 L.J.K.B. 689; 154 L.T. 69.
- (2) *Kulukundis v. Norwich Union Fire Insurance Society*, [1937] 1 K.B. 1; [1936] 2 All E.R. 242; Digest Supp.; 105 L.J.K.B. 703; 155 L.T. 114.
- (3) *Roura & Forgas v. Townend*, [1919] 1 K.B. 189; 29 Digest 273, 2214; 88 L.J.K.B. 393; 120 L.T. 116.
- H** (4) *Coker v. Bolton*, [1912] 3 K.B. 315; 29 Digest 289, 2348; 82 L.J.K.B. 91; 107 L.T. 54.
- (5) *Bensaude v. Thames & Mersey Marine Insurance Co.*, [1897] A.C. 609; 29 Digest 47, 93; 66 L.J.Q.B. 666; 77 L.T. 282.
- (6) *Jackson v. Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; 29 Digest 258, 2087; 44 L.J.C.P. 27; 31 L.T. 789.
- (7) *The Alps*, [1893] P. 109; 29 Digest 210, 1686; 62 L.J.P. 59; 68 L.T. 624.
- (8) *The Bedouin*, [1894] P. 1; 29 Digest 210, 1687; 63 J.J.P. 30; 69 L.T. 782.

- (9) *Turnbull, Martin & Co. v. Hull Underwriters' Asscn.*, [1900] 2 Q.B. 402 ; 29 Digest 211, 1690 ; 69 L.J.Q.B. 588 ; 82 L.T. 818.
- (10) *Russian Bank for Foreign Trade v. Excess Insurance Co.*, [1918] 2 K.B. 123 ; 29 Digest 219, 1750 ; 87 L.J.K.B. 872 ; 118 L.T. 645 ; *affd.* on other grounds, [1919] 1 K.B. 39. .
- (11) *Scottish Marine Insurance Co. v. Turner* (1853), 4 H.L.Cas. 312, n. ; 29 Digest 209, 1678 ; 21 L.T.O.S. 10. A
- (12) *M'Carthy v. Abel* (1804), 5 East, 388 ; 29 Digest 209, 1677.
- (13) *United Kingdom Mutual Steamship Assurance Asscn., Ltd. v. Boulton* (1898), 3 Com. Cas. 330 ; 29 Digest 209, 1679.

APPEAL by the defendant from an order of the Court of Appeal (GREER, SLESSER and MACKINNON, L.JJ.), dated May 23, 1938, and reported [1938] 3 All E.R. 249, reversing a judgment of GODDARD, J., dated Dec. 9, 1937, in favour of the present appellant, and directing that judgment be entered for the present respondents for the sum claimed in the action. The facts and the arguments are set out in the opinions of LORD WRIGHT and LORD PORTER. C

Sir Robert Aske, K.C., and *W. Lennox McNair* for the appellant.
H. U. Willink, K.C., and *A. A. Mocatta* for the respondents.

LORD ATKIN : My Lords, I have had the opportunity of reading the opinions about to be delivered by my noble and learned friends LORD WRIGHT and LORD PORTER, and I agree with their reasoning and with the motion they propose. There was a constructive total loss of the ship, for notice of abandonment is not a condition precedent of such a loss, though it is of a right to sue for such a loss. I further agree that Institute Time Clauses (Freight), cl. 5, overrides the provisions of cl. 8. I wish, however, to reserve the question whether the claim in this case was in any view consequent on loss of time. The question appears to me to be in every case a question of fact, and the authorities should be treated from that point of view. It may prove that the words "consequent on loss of time" have received too wide a construction in some of the cases, and I only desire to register a caution that it must not be assumed from the decision in this case that the loss of freight in question was in fact in consequence of loss of time. D

LORD THANKERTON : My Lords, I also have had the privilege of considering the opinions about to be delivered by my noble and learned friends LORD WRIGHT and LORD PORTER, and I agree with the reasoning and conclusions of those opinions, subject to the caution which my noble and learned friend LORD ATKIN has made clear in the opinion which he has just expressed. I also wish to make it quite clear that I express no opinion at all—because it is quite unnecessary to do so—on the argument which was urged on behalf of the respondents that the Institute Time Clauses (Freight), cl. 5, effected some extension of the perils insured against. E

LORD WRIGHT: My Lords, this appeal raises the question of the true construction of a contract of marine insurance on a vessel named the Petrakis Nomikos, of which the respondents are owners. The policy, dated Aug. 28, 1936, was for "£4,110 on freight chartered or otherwise in and/or over," and was a time policy for 12 months from 6 a.m. on July 20, 1936, to 6 a.m. on July 20, 1937. It was underwritten by the appellant, along with other underwriters. It was against the usual perils—namely, of the seas, men-of-war, fire, and so forth. It was expressed to be subject to the Institute Time Clauses (Freight), which were set out in a slip attached to the policy. They will be referred to as the freight clauses. It also incorporated the hull and machinery policies on the vessel in respect of certain warranties, and contained an express warranty as follows:

... that 50 per cent. (fifty per cent.) of the hull and machinery valuation is uninsured for total or constructive total loss.

The hull and machinery policies, also for time, and dated Aug. 28, 1936, fixed the insured value at £28,000, and, like the freight policy, contained the warranty that 50 per cent. was uninsured for total or constructive total loss. It contained the Institute Time Clauses (Hulls), of which reference may be made to cl. 17 and 18, which were in the following terms:

17. In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or breakup value of the vessel or wreck shall be taken into account.

18. In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not.

Of the freight clauses embodied in the policy sued upon, cl. 5, 6, 7 and 8 are material to this appeal, and are as follow:

5. In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.

6. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

7. In calculating the amount due under this policy in respect of any claim except under cl. 3 and 5, all insurances on freight (including honour policies on freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein.

8. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.

The material facts can be shortly stated. On Sept. 23, 1936, the vessel was chartered to a Belgian company to proceed to Venezuela or Aruba or Curaçoa and load a cargo of crude oil for ports in the United Kingdom or the Continent. The cancelling date under the charterparty was Nov. 10, 1936. On Oct. 18, 1936, the vessel left Havre for Rotterdam for the purpose of repairs before starting in ballast on the voyage to Venezuela. While the repairs were being executed at Rotterdam, there was a violent explosion on board, followed by a fire, as a result of which

the after part of the vessel and the cross-bunker were completely burnt out. The cost of repairs was not less than £37,400, but, as the value of tonnage had risen, the repaired value of the vessel was £47,000. The respondents elected not to abandon the vessel and claim as for a constructive total loss, as they obviously were entitled to do, but had the ship repaired, and claimed for a partial loss up to £27,000, the total amount of the insured value under the policies, less a deductible franchise of £1,000. The repairs were completed on May 31, 1937, and the vessel was thereafter used by her owners, the respondents, as a freight-earning instrument. The charterparty was never performed. A

The respondents based their claim on cl. 5 and 6 of the freight clauses, and averred that the case fell within the precise terms of the clauses, in that there was a constructive total loss of the vessel, while chartered, the cost of repairs being more than the insured value in the policies on ship. They accordingly claimed payment in full of £4,110 under cl. 5. The case was in a sense the converse of *Carras v. London & Scottish Assurance Corp., Ltd.* (1), where the cost of repairs was less than the insured valuation in the policy, but was more than the actual repaired value. The Court of Appeal there held that the clauses in question gave an additional right to the assured, but not an exclusive right superseding the common law rights under the policy, and that the assured were entitled to claim at common law. This decision was in that respect followed by the Court of Appeal in *Kulukundis v. Norwich Union Fire Insurance Society* (2). In neither of these cases was it necessary to consider the precise construction of cl. 5 and 6. In the present case, it is not contested that the respondents are entitled to frame their claim under the Institute clauses as being a right added, or alternative, to the common law rights under the policy. The principal objections raised by the appellant to the claim were (i) that there was not a constructive total loss of the vessel because there had been no notice of abandonment by the owners, who, on the contrary, had elected to retain the vessel and claim as for partial loss, and (ii) that in any case the claim was excluded by cl. 8 as being a claim consequent on loss of time, because the repairs took so long as to make it impossible to perform the charterparty. In my opinion, the appellant fails on both points. What is meant by a constructive total loss is now determined by the Marine Insurance Act, 1906, ss. 60, 61, which will apply to any particular contract of marine insurance unless some different meaning is imported, either expressly or by implication. The question here is whether there was a constructive total loss of the vessel by insurance law. If cl. 5 and 6 are read together, they cannot apply unless there are policies on ship, so as to determine what is the insured value. The appellant contends that the clauses only apply if the shipowner has elected to treat the loss under his hull policies as a constructive total loss by giving notice of abandonment of the ship. The hull policies and the freight policy, however, are distinct contracts, and are only to be read together in so far as one incorporates the other. B C D E F G H

In the policy on freight, it is only cl. 6 which incorporates the hull policy, so far as is relevant to this case, and then only for the purpose of introducing the insured value which is to be found in the hull policies. Clause 5 cannot be construed by considering what action the shipowner took on his hull policies. The words "constructive total loss" must have (apart from cl. 6, which merely invokes the hull policy in order to get a figure of value) the same meaning as if there were no hull policy in existence at all. The test is not the shipowner's intention, or what he did under the hull insurances. In my opinion, notice of abandonment is not an essential ingredient of a constructive total loss. The appellant's argument confuses two different concepts, because it confuses constructive total loss with the right to claim for a constructive total loss. The right to claim, except in certain cases, depends on due notice of abandonment under sect. 62 of the Act. The distinction is explicitly stated in the Marine Insurance Act, 1906, s. 61 which provides as follows :

C Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

The section makes it clear that the right to abandon only arises when there is a constructive total loss in fact. That is the necessary pre-

D condition to a right to abandon. The frame of the section makes it impossible to treat the right to abandon as identical with the constructive total loss. It is a superimposed right of election where there is a constructive total loss. Nor is it even a necessary ingredient of a constructive total loss, because, though there is a constructive total loss, the

E assured may still treat it as a partial loss. The objective definition of a constructive total loss is found in the preceding section of the Act. Some difficulty has been found in interpreting that section, because it consists of two parts. Subsect. (2) is purely objective. It gives the two cases of constructive total loss of ship, the first being deprivation

F of possession, the second the cost of repairs. This is completely consistent with sect. 61. However, sect. 60 (1) is said to be inconsistent, because it makes the constructive total loss depend on the condition that the subject-matter is reasonably abandoned for either of the reasons stated. This, I think, does not qualify the definition in subsect. (2). The two

G subsections contain two separate definitions, applicable to different conditions of circumstances. However, I do not find any inconsistency between sect. 60 (1) and sect. 61. Sect. 60 (1) deals with actual abandonment, which is also an objective fact, not notice of abandonment, which may be necessary for a claim for a constructive total loss even after actual

H abandonment of the subject-matter insured. If there is any inconsistency between sect. 61 and sect. 60 (1), however, there is, in my opinion, no inconsistency at all between sect. 61 and sect. 60 (2), which latter is a definition material in the present case.

I think, therefore, that there was here a constructive total loss of the ship within cls. 5 and 6. This conclusion agrees in principle with the

decision of ROCHE, J. (as he then was), in *Roura & Forgas v. Townend* (3), which was a case of capture of a ship and recapture after a long lapse of time. There was no notice of abandonment of the vessel, because she was not insured at all by her owners. The plaintiffs were not owners, but charterers, insuring their anticipated profits on the charter against total or constructive total loss of the steamer. ROCHE, J., held that there was a constructive total loss within sect. 60 (2) because it had been unlikely that the owners would recover her in a reasonable time. The test was external and objective, and did not depend on the shipowner's election. There was no clause corresponding to cl. 6 of the freight clauses here. Indeed, there could not be, as there was no hull insurance at all. I agree with that conclusion, which I think applies the correct principle for construing sects. 60 and 61. If, however, the question had been whether the appellant could claim, not on his freight policy, but on his hull policy, without having given notice of abandonment of the vessel, the position would have been different. He would have been met by sect. 62, which states the rules as to giving notice of abandonment. These only apply when the shipowner elects to abandon to the insurers under the policy the subject-matter insured by that policy, and seeks to claim as for a constructive total loss under that policy.

One of the conditions, then, of cl. 5 of the freight clauses—namely, that there should be a constructive total loss under the hull policy—has, in my opinion, been fulfilled. No one has suggested that notice of abandonment in respect of the freight was necessary. There is no question that cl. 6 has been correctly applied in regard to the cost of repairs as compared with the insured value. It now becomes necessary to ascertain what is the precise effect of cl. 5. What I think the clause clearly does is to fix a conventional measure of indemnity under the freight policy where the ship has become an actual or constructive total loss. The measure of indemnity stipulated in that event is that the amount underwritten shall be paid “in full.” The final words of the clause—“whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered”—are not, in my opinion, words of limitation, but are words inserted to provide as far as possible for every circumstance in reference to insurable interest in freight which is likely to arise. The loss of the ship to the owners must involve in fact the loss of the vessel's freight-earning capacity. The first part of the final words of the clause, “whether the steamer be fully or partly loaded,” may have been introduced, as HAMILTON, J. (as he then was), said in *Coker v. Bolton* (4), at p. 320:

... for the purpose of meeting the hardship that has long been felt to exist that a shipowner, who has given notice of abandonment and has consequently lost his right to the freight subsequently earned, is precluded from suing on the policy on freight.

This rule, which was founded on decisions of this House, is now embodied

in the Marine Insurance Act, 1906, s. 63 (2). Like most other rules in the Act, it can be excluded by agreement. This hardship may also be excluded in practice, as it was done in the present case and in *Coker v. Bolton* (4), by a clause in the hull policy such as cl. 18 of the hull clauses here. However, these words of cl. 5 may have a wider application, if

A required by the facts of any particular case. They do not apply to this case, in which the ship was neither fully nor partly loaded. The remaining words of the clause—"or in ballast, chartered or unchartered"—seem to be intended to exclude in the most unqualified manner any other question of an assured's insurable interest in the freight. The policy

B is a time policy, and the intention may be to secure that, even if the vessel at the time of the casualty has no cargo on board (that is, is in ballast) and has no charter, there shall be no question of insurable interest, though it is not likely that any underwriter would think of raising such a question in a case of this type. The intention may be

C to provide that the owner's interest in the profit-earning capacity of his ship, which is certainly a good interest in a business sense, should be deemed a sufficient insurable interest for purposes of this policy. I should see no legal obstacle why this agreement should not receive effect. Clause 5 deals with actual, as well as with constructive, total

D loss. However, it is not necessary to discuss this matter here, because the Petrakis Nomikos was actually chartered. Hence, in my opinion, the case comes under cll. 5 and 6 of the freight clauses, so that the respondents are entitled to succeed in their claim.

I do not think it necessary to express any final view on an argument

E which was strenuously urged on behalf of the respondents. This argument was to the effect that cl. 5 involved some extension of the list of perils insured against which were enumerated in the policy. It was contended that all that it was necessary to prove under the clause was that the loss of the vessel was due to perils insured against. Thereupon,

F it was said, the underwriters were liable to pay for any loss of freight, even though due to some extraneous cause, such as the bankruptcy or default of the consignee. In other words, the condition on which payment became due was the loss, actual or constructive, of the vessel by perils insured against, as the stipulated event in which the sum due under the

G freight policy became payable, though it had no actual effect in causing the loss of freight. The question does not, in my opinion, as I have explained, arise in this case, and I should be content to say no more than that I reserve my opinion on it. I shall, however, out of respect to the argument advanced, add that, as at present advised, I should not be prepared

H to accept that construction. It would mean that the policy, *pro tanto*, was not a policy of indemnity, which appears to me to be inconsistent with the view of HAMILTON, J., in *Coker v. Bolton* (4). It would also mean that in this particular respect it was not a policy of marine insurance. However, HAMILTON, J., regarded it as a contract of marine insurance, because he held that the underwriters' title to salvage and

the provisions of the Marine Insurance Act applied. The contention construes the policy as a policy *pro tanto* covering other than marine risks, for instance, insolvency or default of the consignee. Clauses 5 and 6, however, are only parts of a contract of marine insurance, which is limited to the perils set out in the body of the policy. There are no express words adding outside risks. The loss, actual or constructive, A of the ship is not an added peril, but a loss or casualty operating on the freight through the ship. However, the question certainly does not, as I think, arise in this case. I reserve my opinion upon it, in case it should ever arise for decision.

There remains to be considered the second point taken by the appellant B—namely, that the claim here is excluded by cl. 8 of the freight clauses. So far as authority goes, such a contention has been rejected in circumstances similar in principle to the present by ROCHE, J., in *Roura & Forgas v. Townend* (3) and by the Court of Appeal in *Carras' case* (1). For the appellant, however, reliance was placed on *Bensaude v. Thames C & Mersey Marine Insurance Co.* (5), a decision based on words identical with those in cl. 8 in the present policy, but the policy there did not contain clauses like cll. 5 and 6 of the freight clauses. The facts, moreover, in that case were quite different. There was no constructive loss of the ship. Soon after starting on her chartered voyage, she was disabled D by the breaking of her main shaft, due to perils of the sea. She was towed back to port, where repairs could not be effected, and delay was incurred in taking her to another port, where she was repaired. The charterers, as they were entitled to do by the foreign law applicable, threw up the contract. The loss of freight was caused simply by the E delay in repairing the particular average damage arising from the peril of the sea, the delay being such as to frustrate the object of the adventure. Such a loss of freight would have been, apart from this special clause, recoverable under the authority of *Jackson v. Union Marine Insurance Co.* (6). The object of the clause was to protect the underwriters from F this liability. LORD WATSON, in *Bensaude's case* (5), at p. 613, said that, but for the delay occasioned by the breaking of the shaft, there would have been no loss [that is, of freight] to claim. LORD HERSCHELL said, at p. 614 :

... if the claim depends on loss of time in the prosecution of the voyage so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability. G

The loss of freight was due to loss of time, and nothing else, though arising from a peril of the sea. In my opinion, it is impossible to apply this reasoning to the entirely different facts and the entirely different H contract in the present case. I do not think that, on the facts of this case, the claim was consequent on loss of time within cl. 8. Clause 8 must be read with cl. 5. Under cl. 5, the underwriter's liability to pay depends on the loss, actual or constructive, of the vessel. That liability accrues at once when the casualty happens, even if the exact position

- is not ascertained till later. If the assured has rightly given notice of abandonment of the ship, the loss dates back retrospectively to the date of the casualty. The property in the vessel then passes to the hull underwriters, and the shipowner is not interested whether there is a loss of time or not. He can claim on his freight policy under cl. 5 and 6 in
- A** a proper case. Equally here the loss is complete at the date of the fire. The question of loss of time after the casualty does not enter into the question of liability. The claim under cl. 5 does not depend on loss of time in the prosecution of the voyage within the language used by LORD HERSCHELL. The fact that the vessel could not be repaired in time to
- B** make her cancelling date is immaterial under cl. 5. In one sense, every case of a constructive total loss based on the cost of repairs, or on deprivation of possession, implies that it will take some time to make the repairs, or recover possession, and, if a claim under cl. 5 were treated as a claim consequent on loss of time, the operation of cl. 5 would be
- C** defeated in the vast majority of cases by cl. 8, except in the case of actual total loss. In my opinion, however, that is not the true construction of either cl. 5 or cl. 8. The loss under cl. 5 occurs *eo instanti*, and does so none the less because the shipowner has retained and repaired the vessel. The sole condition under cl. 5 is that the vessel should be an
- D** active or constructive total loss. Clauses 5 and 8 must be read together. Clause 8 cannot control cl. 5, but has its proper application in cases like *Bensaude's* case (5). I reject also the second contention advanced on behalf of the appellant. In my opinion, the judgment of the Court of Appeal was right, and should be affirmed, and the appeal should be
- E** dismissed with costs.

- LORD PORTER: My Lords, the present appeal raises the question of the right of the respondents to recover against the appellant under the terms of a policy on freight dated Aug. 28, 1936. The respondents
- F** are the owners of the Petrakis Nomikos. The appellant is an underwriting member of Lloyd's. The policy of marine insurance, upon the true construction of the terms of which the result of the present appeal depends, was underwritten by the appellant, and is expressed to be "on freight chartered or otherwise in and/or over." The freight was that to be
- G** earned by the Petrakis Nomikos, and the policy was stated to be subject to the Institute Time Clauses (Freight), subject to the same warranties as on hull and machinery, and warranted that 50 per cent. of the hull and machinery valuation is uninsured for constructive, or constructive total loss. The policy was a time policy for 12 months covering the
- H** ordinary marine risks. Attached to and forming part of it were the Institute Time Clauses (Freight). Of these clauses, three are material to the question in issue in the present appeal. They are as follow:

5. In the event of the total loss, whether absolute or constructive of the steamer, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.

6. In ascertaining whether the vessel is a constructive total loss the insured value

in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

8. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.

In addition to the freight policy, the respondents were insured by a policy of marine insurance of the same date, which, like the freight policy, was subscribed by the appellant. The second-named policy was expressed to be on the hull and machinery of the Petrakis Nomikos, valued at £28,000, against the ordinary marine perils, subject to a deductible franchise of £1,000 from the aggregate of all particular average claims on each round voyage. This policy, which will be called the hull policy, contained in type the following clause :

In the event of the total or constructive total loss of this vessel this policy is only to pay its proportion of £14,000.

To it were attached the Institute Time Clauses (Hulls), of which three also are material—namely, cl. 16, 17 and 18. Their terms are as follow :

16. In no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy.

17. In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or breakup value of the vessel or wreck shall be taken into account.

18. In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not.

While these two policies were in force, the respondents chartered the vessel by a charterparty dated Sept. 23, 1936, to a Belgian company to sail to Venezuela or Aruba or Curaçoa and there load a cargo of crude oil for various European ports. This charterparty contained a cancelling clause under which the charterers had the option of cancelling should the steamer not be ready to load by Nov. 10, 1936.

On Oct. 18, 1936, the vessel left Havre for Rotterdam in order to undergo certain repairs before starting in ballast on her voyage to South America. On Oct. 31, whilst repairs were being carried out at Rotterdam, an explosion, followed by a fire, occurred in the aft part of the ship, with the result that that part and the cross-bunker were completely burnt out. The vessel was then surveyed and tenders for her repair were asked for. The lowest tender received was £37,400, and in fact the vessel could not have been repaired for a less sum. The value of tonnage, however, had risen since the hull policy was effected, and the respondents, ascertaining that the repaired value of the ship would be about £45,000, decided not to abandon her to the hull underwriters or to claim on them for a constructive total loss, but to claim in respect of the cost of repairs for a partial loss. For a constructive total loss they would have received only £14,000, since the vessel was uninsured against total loss to the extent of 50 per cent. In a claim for a partial loss, they were entitled to recover £27,000—that is, £28,000 less the franchise of £1,000—and, at an expenditure of £37,400, to repair a ship which would then be worth upwards of £45,000. The repairs were completed on May 31, 1937, and the respondents have thereafter used

the vessel as a freight-earning instrument. However, the charterparty, though it was never cancelled, was in fact never performed, and the respondents have received no part of the freight payable thereunder.

In these circumstances, the respondents claimed that they were
 A entitled to recover the sum of £4,110 under cl. 5 of the Institute Time
 Clauses in the freight policy, and from the appellant his proportion of
 that sum. The appellant maintained that the respondents had suffered
 no loss by a peril insured against, or at any rate that the claim was a
 claim consequent on loss of time, and that he was therefore exempted
 B from payment by the Institute Time Clauses (Freight), cl. 8. He alleged
 that there had never been a constructive total loss, but that, even if
 there had been such a loss, the ship having been repaired, the freight
 was lost by the time taken for the reparation, and not by the constructive
 total loss of the ship. The respondents, on their part, contended that
 C there had been a constructive total loss, and that there was no necessity
 to prove that the loss was caused thereby. The sum insured was, they
 said, payable in an event—namely, in the event of the total loss or
 constructive total loss of the ship, so long, at any rate, as that total loss
 or constructive total loss was caused by a peril insured against—but they
 D contended that, if it was necessary to prove that the loss was caused
 by the total loss or constructive total loss of the ship, it was so caused,
 and not by loss of time. The judge who tried the case in the court of
 first instance held that there had been no constructive total loss, inas-
 much as the ship has been repaired, and not abandoned to underwriters,
 E and that in any case there had been no loss by a peril insured against.
 The Court of Appeal reversed the decision of the judge, holding that
 there was a constructive total loss of the ship by a peril insured against,
 and that the insurance was against the happening of that event.

In these circumstances, the first question which your Lordships have
 F to decide is whether there was a constructive total loss of the ship within
 the meaning of the Institute Time Clauses (Freight), cl. 5. Having
 regard to the facts and figures agreed upon by the parties, the repairs
 required would have cost more than the agreed value of the ship inserted
 in the hull policies. Is this enough? The appellant says: "No." In
 G his contention, there can be no constructive total loss unless the ship
 be abandoned to her underwriters. Constructive total loss, he says,
 is defined in the Marine Insurance Act, 1906, s. 60, and by sect. 60 (1):

There is a constructive total loss where the subject-matter insured is reasonably
 H abandoned on account of its actual total loss appearing to be unavoidable, or
 because it could not be preserved from actual loss without an expenditure which
 would exceed its value when the expenditure had been incurred.

Subsect. (2), he maintains, only gives particular instances of the general
 definition in subsect. (1). It says that:

In particular, there is a constructive total loss . . . (ii) in the case of damage to a

ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

Therefore, it means there is a constructive total loss where the ship is reasonably abandoned because the cost of repair would exceed her value when repaired.

That sect. 60 is intended to be a complete, and not a partial, definition appears to follow from the wording of sect. 56 :

. . . any loss other than a total loss, *as herein-after defined*, is a partial loss.

It does not follow, however, that the first subsection lays down the general rule, whereas the second gives certain particular instances already covered by the general rule. Indeed, whatever may be the case with regard to subsect. (2) (i), paras. (ii) and (iii) do not appear to be covered in terms by the definition in subsect. (1). In any case, however, unless there is some reason to the contrary, a definition must be held to include the whole of its wording, and, if particular instances are given which include matters which are outside the more general definition, that is no reason for supposing that their application is limited by the more general words. They do not merely illustrate, they add to the terms of the definition. Sect. 60 does not confine constructive total loss to cases where the subject-matter of insurance has been abandoned, though in some instances there may be no constructive total loss unless abandonment has taken place. Even if abandonment be not a condition of a constructive total loss, it is said that in this case there has been neither abandonment nor notice of abandonment and the ship has in fact been repaired. In that case, it is argued, under sects. 61 and 62 the loss can only be treated as a partial loss, and consequently there can be no constructive total loss within the meaning of cl. 5 of the freight policy.

Sect. 61 no doubt gives the assured an election whether to treat the loss as total or partial, and sect. 62 makes it a condition precedent to a claim for a total loss that notice of abandonment should be given, but in terms sect. 61 contemplates the existence of a constructive total loss even where the loss is treated as partial. It was not contended before us that there could not be a constructive total loss where no notice of abandonment was given. It was admitted that notice of abandonment was merely a condition precedent to recovery in a case where a constructive total loss had already occurred. Having regard to the wording of sect. 61, abandonment may be a condition or consequence of recovery, and not a condition precedent to the existence of a total loss, whether actual or constructive. A constructive total loss may exist, but, if the assured wishes to take advantage of it, he must give notice of abandonment, at any rate in a case where there would be any possibility of benefit to the insurer. If he does give notice, and the underwriters accept the abandonment, or if the assured recover as for a total loss, the property insured thereby becomes the property of the underwriters. If this view be sound, there was a constructive total loss, albeit a con-

- ventional constructive total loss, of the ship by a peril insured against, and undoubtedly the freight to be earned under the charterparty of Sept. 23, 1936, was lost. What, then, caused the loss of freight? The loss of the ship was constructive, but the loss of freight was actual. If, therefore, there was no provision as to loss of time, the underwriters
- A** on freight would be liable: *Jackson v. Union Marine Insurance Co.* (6), *The Alps* (7) and *The Bedouin* (8). However, there is such a provision contained in cl. 8, and it is contended in the present case that the loss of freight was due to loss of time, and to that only. The ship, it is said, was in fact repaired, and could have carried the cargo had she been
- B** repaired in time. Indeed, if the charterers had chosen to wait, or if the repairs could have been effected in a very short time, the cargo would have been carried and the freight earned. How, then, it is asked, can it be said that the conventional constructive total loss has caused the loss of freight? It is true that the loss of time caused the loss of the
- C** adventure, but such a loss is none the less due to the delay. For this result the appellants rely upon the decisions in *Bensaude v. Thames & Mersey Marine Insurance Co.* (5), *Turnbull, Martin & Co. v. Hull Underwriters' Assocn.* (9) and *Russian Bank for Foreign Trade v. Excess Insurance Co.* (10).
- D** In all those cases, there was a loss of the adventure by which the freight was to have been earned. Nevertheless, that loss was held to be due to delay, and was therefore excluded by phraseology identical with, or similar to, that used in the policy now sued upon. In none of these cases, however, was there a total, or constructive total, loss of the ship,
- E** and in none did the provisions of the Institute Time Clauses (Freight), cl. 5, come under discussion, either alone or in relation to their effect on cl. 8. The construction of those clauses and their relationship one to the other are, however, vital to the determination of the present case. Read together, it is possible to construe them in either of two ways.
- F** In the first place, they may mean: "If loss of freight be caused by loss of time, the underwriters shall not be liable, provided that, if the vessel is a constructive total loss, then the underwriters will pay in full whether the cause of the loss of freight be loss of time or not." Secondly, they may mean: "In no case will the underwriters be liable for loss caused
- G** by loss of time, whether the vessel be a constructive total loss or not." For myself, I prefer the former of the two constructions, but it is enough to say that the meaning is doubtful, that the proviso as to loss of time is an exception to the general liability of underwriters, and that, if they leave their exemption of liability doubtful, they cannot rely upon the
- H** exception, but must pay the loss.

This is sufficient to dispose of the case, and accordingly I desire to reserve the question whether the loss of freight is not rightly to be regarded as caused, not by loss of time, but by the constructive total loss of the ship. Some support is lent to this suggestion by the decision in *Roura & Forgas v. Townend* (3), a case of freight insurance in which

a vessel, though originally lost by capture, was afterwards restored to her owners, so that in one sense it might be said that the loss of freight was due to the loss of time during which the ship was in the hands of the captors, and not to the constructive total loss of the ship by the capture. Yet ROCHE, J., held, and I think rightly, that one must regard the ship as having been lost as soon as it became unlikely that the owners would recover her. She was in fact uninsured, and no question of abandonment arose, but, had she been insured and notice of abandonment given but not accepted, the right to recover upon the hull policy would have been precluded, not because she was not a constructive total loss, but because she had been restored, and the owners who had been indemnified by the restoration could not claim to be indemnified over again. In these circumstances, the judge held that the underwriters on freight were not protected by the warranty against liability for claim consequent upon loss of time, but were liable, because the ship, though afterwards restored, was in fact a constructive total loss.

I desire also to reserve the question raised in argument by the respondents, and, I think, adopted by the Court of Appeal, that, under the terms of cl. 5, provided the freight was in fact lost, the sum insured was payable on the happening of a total loss, whether or not that event caused the loss of freight. If, it was said, the ship became an actual or constructive total loss—at any rate, in a case where that loss was due to one of the perils insured against, and freight also was lost—the sum insured was payable even though the loss of freight was caused by the bankruptcy of the freighter, or some extraneous conditions which prevented loading. Such a construction is, I think, inconsistent with the view expressed by HAMILTON, J., in *Coker v. Bolton* (4), and is not easy to reconcile with the principles of marine insurance.

In *Scottish Marine Insurance Co. v. Turner* (11), where there were no provisions such as those to be found in cl. 5, and the ship was abandoned but freight was earned, it was held that the assured on freight were unable to recover because freight was in fact earned, and in *M'Carthy v. Abel* (12) it was pointed out by LORD ELLENBOROUGH, C.J., that the loss was not due to a peril of the seas, but to the abandonment, which was the act of the assured themselves. In *Coker v. Bolton* (4), however, and *United Kingdom Mutual Steamship Assurance Assn., Ltd. v. Boulton* (13), the assured recovered owing to the presence of a clause identical with, or similar to, cl. 5 in the present policy. In the latter case, BIGHAM, J., held a promise to pay a loss of freight “in the event of the total loss of the vessel” to mean that the underwriters would pay a loss of freight in circumstances similar to those existing in the *Scottish Marine* case (11). Such a loss was, in his view, recoverable, not because it was a loss of perils of the seas, but because the terms of the policy covered a loss by abandonment.

The judge's view, if right, involves an addition to the perils insured against, so as to include amongst them the peril of abandonment, but

even such an extension does not go so far as to determine that the mere coincidence of a constructive total loss of the ship with a loss of freight, however caused, is sufficient to enable the assured to recover under the terms of cl. 5 of the policy. It is not necessary, however, to come to any final decision upon this point in the present case, and I agree
A that the appeal should be dismissed.

LORD ATKIN: My Lords, I am asked by my noble and learned friend LORD RUSSELL OF KILLOWEN to say that he agrees with the opinions of LORD WRIGHT and LORD PORTER.

B *Appeal dismissed with costs.*

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellant); *Holman, Fenwick & Willan* (for the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

C

SIR HARI SANKAR PAUL AND ANOTHER v. KEDAR NATH SAHA (since deceased, now represented by SRIMATI JOGEMAYA DASSA AND OTHERS) AND OTHERS.

D PRIVY COUNCIL (Lord Macmillan, Lord Romer and Sir George Rankin),
March 13, 14, April 25, 1939.]

Privy Council—India—Mortgage—Mortgage by deposit of deeds—Accompanying memorandum—Memorandum referring to money thereby secured and containing power of sale—Whether memorandum or operative security—Registration—Indian Transfer of Property Act, 1882 (No. 4 of 1882), s. 59—Indian Registration Act, 1908 (No. 16 of 1908), ss. 17 (1) (b), 49 (c).

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The general law in India under the Transfer of Property Act, 1882, is that a mortgage for a principal sum of Rs.100 or upwards can be effected only by a registered instrument signed and attested, but the validity of mortgages by deposit of title deeds in Calcutta and certain other places is expressly recognised and saved. Towards the end of 1923, the respondents arranged with the appellants for a loan of Rs.25,000, for which certain property in Calcutta, owned by the borrowers, was to be the security. A document was subsequently signed on behalf of the respondents setting out the terms and conditions of the advance—namely, that the loan was to be made by two advances, the first of which was to be made on the deposit of the documents of title relating to the Calcutta property, and, after the balance of the loan had been received, the mortgagors would execute in favour of the mortgagee a memorandum evidencing the deposit and embodying the terms and conditions of the loan. These conditions were carried out, and, on receipt of the second portion of the loan in 1924, the respondents executed the memorandum of agreement referred to. This memorandum, which was not registered, stated that it was thereby agreed that certain deeds should be held as a security on the property, and referred to proceedings for the protection of this security or for procuring the payment of the moneys thereby secured. It conferred a power of sale, but referred parenthetically to the title deeds having been delivered with intent to create a security. The respondents contended that the memorandum constituted the bargain between the parties, and that, inasmuch as it was not registered, it was inadmissible in evidence, and that the mortgage was consequently unenforceable. The appellants contended that the memorandum did

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not effect or constitute any transaction between the parties, but merely recorded a transaction already completed, and, therefore, did not require registration :—

HELD : the memorandum in question was not a mere memorandum of a security created by deposit of deeds, but was itself the operative instrument creating the security.

[EDITORIAL NOTE. Though dealing with Indian law, this case has an important bearing on general law. The transaction by which money is advanced upon a deposit of documents of title is well known in all parts of the British Empire. The question here considered is the distinction between a mere memorandum of a deposit of documents and an instrument which goes beyond a mere memorandum and itself constitutes the security upon which the money is advanced.

AS TO MEMORANDUM OF DEPOSIT OF DOCUMENTS OF TITLE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 233-238, paras. 342-351 ; and FOR CASES, see DIGEST, Vol. 35, pp. 254-264, Nos. 126-233.]

Cases referred to :

- (1) *Obla Sundarachariar v. Narayanna Ayyar* (1931), 58 Ind. App. 68.
- (2) *Subramonian v. Lutchman* (1922), 50 Ind. App. 77.
- (3) *Kedarnath Dutt v. Shamloll Khetry* (1873), 11 Ben. L.R. (O.C.J.) 405.
- (4) *Pranjivandas Mehta v. Chan Ma Phee* (1916), 43 Ind. App. 122.

APPEAL from a judgment and decree of the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction (COSTELLO and PANCKRIDGE, JJ.), dated Apr. 6, 1937, which reversed a judgment and decree of the High Court in its ordinary original civil jurisdiction (LORT-WILLIAMS, J.), dated May 22, 1936. The judgment of their Lordships was delivered by LORD MACMILLAN.

A. M. Dunne, K.C., and J. M. Pringle for the appellants.

Lionel Cohen, K.C., and J. M. Parikh for the respondents.

LORD MACMILLAN : The plaintiffs in this suit, now the appellants, seek to enforce a mortgage for the principal sum of Rs.25,000, with arrears of interest accrued. Their case is that the mortgage was effected by the delivery to them of the documents of title to certain immovable property in Calcutta with intent to create a security thereon. The general law in India under the Transfer of Property Act, 1882, is that a mortgage for a principle sum of Rs.100 or upwards can be effected only by a registered instrument duly signed and attested, but the validity of mortgages by deposit of title deeds in Calcutta and certain other places is expressly recognised and saved, doubtless because of the convenience of this form of security in commercial centres (see sect. 59 of the Act as it stood at the date of the transaction with which this case is concerned, and now, by amendment, sect. 58 (f)).

That the title deeds of the property were deposited by the respondents with the appellants is not disputed, but the appellants were not content to rely only on this deposit. They insisted on the execution by the respondents of a memorandum of agreement "evidencing the said deposit and embodying the terms and conditions of the loan." The appellants found upon this memorandum in their plaint, and the respondents in their

written statement aver that this memorandum constituted the bargain between them and the appellants, and they maintain that, inasmuch as it was not registered as required by the Indian Registration Act, 1908, s. 17 (1) (b), it is inadmissible in evidence, and the mortgage is consequently unenforceable under sect. 49 of that Act. To this the appellants

A reply that the memorandum did not effect or constitute any transaction between the parties, but merely recorded a transaction already completed. It therefore did not require registration, not being, in the words of the statute, a non-testamentary instrument purporting or operating :

B . . . to create, declare, assign, limit or extinguish . . . any right, title or interest . . . to or in immovable property.

There have been numerous cases, some of which have reached this Board, in which a mortgage, alleged to have been effected by the deposit of title deeds, has been accompanied by a written document, and in which the question has arisen whether that document was of such a character

C as to require registration. The decision in each case has turned upon the nature of the document in question. It will be sufficient to refer to one or two of the most recent of these cases. In *Obla Sundarachariar v. Narayanna Ayyar* (1), the title deeds of certain properties were handed over as security for a loan, along with two written documents—namely, D a promissory note for the total advance and a signed memorandum consisting of a list of the title deeds, prefaced with the names of the parties and the following words :

As agreed upon in person I have delivered to you the undermentioned documents as security.

E In the view of their Lordships, as expressed by LORD TOMLIN, at pp. 72, 73, the memorandum was a document which

. . . merely records particulars of deeds the subject of a deposit . . . it was and remained a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties.

F Their Lordships accordingly reached the conclusion [p. 74] :

. . . that the memorandum was not other than a written record of the particulars of deeds the subject of an agreement constituted in fact by the act of deposit and the payment of the money, and that it neither purported nor operated to create or declare any right, title or interest in the property included in the deeds, with the result that it did not require registration.

G With this case, that of *Subramonian v. Lutchman* (2) may be contrasted. There, on the occasion of the deposit of the title deeds, a memorandum was signed and delivered to the lender or creditor which stated as follows [p. 79] :

We hand you herewith title deeds relating to [certain specified property] . . . this please hold as security against advances made to us.

H The memorandum in addition referred to a promissory note and a second mortgage over certain other property, both in favour of the borrowers, which they also handed over as security for the advances made to them, and the document concluded as follows :

We promise not to deal with same till your amount due you is fully paid and satisfied.

In delivering their Lordships' judgment, LORD CARSON quoted passages from *Kedarnath Dutt v. Shamloll Khettry* (3) and *Pranjivandas Mehta v. Chai Ma Phee* (4) as laying down the law on the subject, and stated the criterion to be as follows, at p. 83 :

Did the document . . . constitute the bargain between the parties or was it merely the record of an already completed transaction ?

On the evidence, and on the terms of the document, their Lordships had no doubt [p. 84] :

. . . that the memorandum in question was the bargain between the parties and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected.

Commenting on this passage, LORD TOMLIN, in the case above quoted' said on behalf of the Board, at p. 74 :

While their Lordships do not think that the language of LORD CARSON conveys or was intended to convey the meaning that no memorandum relating to a deposit of title deeds can be within sect. 17 of the Indian Registration Act unless it embodies all the particulars of the transactions of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties.

With these considerations in mind, their Lordships proceed to examine the facts of the present case. It appears that towards the end of 1923 three brothers, Kedar Nath Saha, Atindra Nath Saha and Jnanendra Nath Saha, who, or whose representatives, are the present respondents, arranged with the appellants for a loan of Rs.25,000, for which certain property in Calcutta owned by the borrowers was to be the security. The parties having reached agreement as to the terms of the loan, the transaction was carried out as follows. On July 24, 1924, a meeting took place at the office of the attorneys for the appellants, at which were present Hari Mohan Paul, one of the two appellants, on behalf of himself and his brother, the other appellant, and Jnanendra Nath Saha, on behalf of himself and his two brothers. At this meeting a document was signed by Jnanendra Nath Saha setting out the terms and conditions of the advance. It provided that Rs.12,000 should be paid on that day and the balance of Rs.13,000 on or before July 31, 1924, that the rate of interest was to be 9 per cent. per annum, and that the period of the loan was to be one year from Aug. 1, 1924. It further provided that the advance of Rs.12,000 :

. . . will be made on the deposit of the documents of title relating to the premises, No. 75, Beniatolla Street, abovementioned, and after the balance of Rs.13,000 shall be paid the mortgagors will execute in favour of the mortgagee a memorandum evidencing the said deposit and embodying the terms and conditions of the loan.

Jnanendra, having signed this document, formally handed over the title deeds to the appellants' attorneys, saying as he did so :

For the sum of Rs.12,000, which I have taken out of the loan of Rs.25,000, I am depositing these documents of title by way of security or mortgage.

The sum of Rs.12,000 was thereupon paid over to Jnanendra, who signed a receipt on the memorandum for the sum of Rs.12,000 advanced

“on the security and upon the terms and conditions hereinbefore mentioned.”

Subsequently, on Aug. 2, 1924, the balance of Rs.13,000 was paid to Jnanendra, who repeated the formality of handing the title deeds to the appellants' attorneys, stating as follows :

A . . . for the sum of Rs.12,000 which I have already received out of Rs.25,000 and for the sum of Rs.13,000 which I am receiving now these documents will be kept in security.

Later on the same day, Jnanendra executed the memorandum of agreement now in question.

B This memorandum of Aug. 2, 1924, is a formal and elaborate document. It designates the borrowers as the mortgagors and the lenders as the mortgagees, and recites that the mortgagors are the owners of the property described in the first schedule, that the mortgagors had applied to the mortgagees to lend them Rs.25,000, and that the mortgagees had agreed to make this advance on the security of the documents of title specified in the second schedule. It further recites that the mortgagees had on July 24, 1924, paid to the mortgagors Rs.12,000, and that, as security for this sum, the mortgagors had deposited with the mortgagees' agents the documents of title specified in the second schedule, and that the mortgagees, prior to the execution of the memorandum, had paid over the balance of Rs.13,000. The memorandum then proceeds to set out that it is thereby agreed and declared between the parties that, in consideration of the two sums of Rs.12,000 and Rs.13,000 paid before the execution of the memorandum, the title deeds described in the second schedule :

E . . . which said deeds evidences and writings have as hereinbefore stated prior to the execution of this agreement been delivered by the mortgagors to the mortgagees' said agents in the town of Calcutta with intent to create a security on the said hereditaments and premises described in the said first schedule hereto such as is contemplated in the concluding proviso to sect. 59 of the Transfer of Property Act (such security having been created prior to the execution of this agreement by the delivery of the documents hereinbefore mentioned—would (*sc.* shall) be held by the mortgagees as such security as aforesaid for the payment by the mortgagors to the mortgagees at the time and in the manner hereinafter mentioned and the costs (as between attorney and client) charges and expenses of and incidental to any proceeding which may be had for the protection of this security or for procuring or obtaining or attempting to obtain payment of the moneys hereby secured.

G There follows a series of heads dealing with the date of repayment, rate of interest, consequences of default, warranty of title, and various other matters, and the memorandum in conclusion confers on the mortgagees a power of sale of the mortgaged property. A receipt for the total sum of Rs. 25,000 is appended.

H Such being the tenor of the memorandum of Aug. 2, 1924, and such the circumstances attendant on its execution and delivery, the question is whether it required to be registered. LORT-WILLIAMS, J., held that it did not, being satisfied that the memorandum :

. . . was nothing but a record of what had been agreed to orally on July 24 [and] not a document containing the bargain made between the parties.

On appeal, COSTELLO, J., with whom PANCKRIDGE, J., concurred, was of the contrary opinion, holding that "the writing was of such a character as calls for registration," for the reasons set out in a long and careful judgment.

Their Lordships find themselves in agreement with the Appellate Court. The leading feature of this case is that the appellants' advisers were evidently quite aware of the niceties of the law in the matter, and deliberately endeavoured to effect a valid mortgage by delivery of title deeds, and at the same time to accompany it with an effective written document which would nevertheless not require registration. The appellants, in their Lordships' opinion, have over-reached themselves, and have failed to achieve their purpose. A
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In the first place, it is made clear by the earlier memorandum of July 24, 1924, that the parties contemplated from the outset that a document should be executed "evidencing the said deposit and embodying the terms and conditions of the loan," and this earlier memorandum bears an acknowledgment of the receipt of the first instalment of the loan as having been advanced "on the security and upon the terms and conditions hereinbefore mentioned." When the memorandum of Aug. 2, 1924, subsequently executed, is examined, it is found to contain all the essentials of the transaction. It states that it is *hereby* agreed and declared between and by the parties that, in consideration of the sums advanced, the title deeds of the property shall be held as a security on the property, and refers to any proceeding which may be had for the protection of *this security* or for procuring payment of the moneys *hereby secured*. It then sets out all the details of the transaction, and specifically confers a power of sale on the mortgagees. It is true that, in the parenthetical passage, quoted above, the title deeds are stated to have been previously delivered with intent to create a security, but that does not alter the character of the memorandum itself, which, if the parenthetical passage be disregarded, is an instrument effective to create an interest in the property in favour of the mortgagees. Having purported to create a mortgage by delivery of title deeds, the parties proceeded to create it over again in writing. The memorandum does not merely evidence a transaction already completed. Its language is operative. It is contractual in form, and it embodies an agreement that the title deeds in question are to be held as security for the advances made, and it speaks of the moneys "*hereby secured*." It not only contains all the terms on which the moneys were advanced, but it also expressly confers a power of sale. It is noteworthy that, in the appellants' "concise statement" of their claim in the plaint, they state that they sue for a decree : C
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. . . for realisation of the principal and arrears of interest due and payable under a memorandum of agreement dated Aug. 2, 1924.

Their Lordships are of opinion that, where, as here, the parties professing to create a mortgage by deposit of title deeds contemporaneously enter

into a contractual agreement, in writing, which is made an integral part of the transaction, and is itself an operative instrument, and not merely evidential, such a document must under the statute be registered. The appeal accordingly fails. Their Lordships will humbly advise His Majesty that the decree of the Appellate Court of Apr. 6, 1937, be affirmed **A** and the appeal dismissed. The legal representatives of the respondent Kedar Nath Saha, who alone appeared, will have their costs of the appeal.

Appeal dismissed with costs.

Solicitors : *W. W. Box & Co.* (for the appellants) ; *Stanley Johnson & Allen* (for the respondents). **B**

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

C ETTENFIELD v. ETTENFIELD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **February 23, 24, 28, March 1, 2, May 10, 1939.**]

Bastardy—Presumption of legitimacy—Separation deed—Evidence of non-access—Admissibility.

D The respondent having left his wife in Aug., 1935, a separation agreement was arrived at between them in Sept., 1935. The terms of this agreement were set out in correspondence between solicitors acting for the two parties, and were consistently observed by both parties. The parties continued to live in the same town, but rarely met. While they were so separated, the wife on May 26, 1937, gave birth to a child. **E** The wife asserted that marital relations had been resumed in Aug., 1936, but this was denied by the husband. The question thus arose whether or not, in these circumstances, the husband could in law adduce evidence of non-access :—

F HELD : the position where the separation agreement is an informal one, not by deed and not under seal, is no different from that where the agreement is under seal, and the husband here could give evidence of non-access.

G [EDITORIAL NOTE. The case of *Stafford v. Kidd* (6) held that evidence of non-access could be given where there was a separation deed. The matter is now carried one step further and it is held to be immaterial that the separation agreement is not by deed. There must, of course, be evidence of a real agreement acted on by the parties.

AS TO RULE IN *Russell v. Russell*, see HALSBURY, Hailsham Edn., Vol. 2, pp. 562, 563, para. 772 ; and FOR CASES, see DIGEST, Vol. 3, pp. 364-368, Nos. 54-97.]

Cases referred to :

- H** (1) *Russell v. Russell*, [1924] A.C. 687 ; Digest Supp. ; 93 L.J.P. 97 ; 131 L.T. 482.
 (2) *St. George's v. St. Margaret's, Westminster (Parishes of)* (1706), 1 Salk. 123 ; 3 Digest 360, 20.
 (3) *Hetherington v. Hetherington* (1887), 12 P.D. 112 ; 3 Digest 366, 71 ; 56 L.J.P. 78 ; 57 L.T. 533.
 (4) *Mart v. Mart*, [1926] P. 24 ; Digest Supp. ; 95 L.J.P. 29 ; 134 L.T. 446.

- (5) *Re Bromage, Public Trustee v. Cuthbert*, [1935] Ch. 605; Digest Supp.; 104 L.J.Ch. 299; 153 L.T. 313.
- (6) *Stafford v. Kidd*, [1937] 1 K.B. 395; [1936] 3 All E.R. 1023; Digest Supp.; 106 L.J.K.B. 193; 156 L.T. 75.
- (7) *Collis v. Collis and Thomas* (1933), 77 Sol. Jo. 573; Digest Supp.
- (8) *Rimmer v. Rimmer* (1930), 144 L.T. 96; Digest Supp.
- (9) *The Poulett Peerage*, [1903] A.C. 395; 3 Digest 366, 76; 72 L.J.K.B. 924. A
- (10) *Andrews v. Andrews and Chalmers*, [1924] P. 255; Digest Supp.; 93 L.J.P. 137; 132 L.T. 400.
- (11) *Morris v. Davies* (1837), 5 Cl. & Fin. 163; 3 Digest 363, 49.
- (12) *Head v. Head* (1823), Turn. & R. 138; 3 Digest 359, 11.

CONSOLIDATED PETITIONS. In the first petition, the wife sought a B
decree of restitution of conjugal rights, to which the husband
pleaded just cause for refusal and set up the subsistence of an
agreement between the parties to live apart. He also alleged want of
sincerity. The wife denied the allegations. In the second petition,
the husband sought a decree of dissolution on the ground of adultery. C
The wife denied the allegation. The husband's case was based on
the fact that the wife had given birth to a child whose paternity was in
dispute. In support of that charge, it was necessary for the husband
to give evidence of non-access at the time when the child was con-
ceived, and the question arose whether the rule in *Russell v. Russell* (1) D
precluded the husband from so doing, as, at the material time, the parties
were living apart under what was only an informal agreement, distinguish-
ing the facts here from those in *Mart v. Mart* (4).

J. B. Latey for the wife.

The Earl of Drogheda for the husband. E

LANGTON, J. : In this litigation, two suits are presented to the court.
In the first, the wife asks for a decree of restitution of conjugal rights,
and, in the second, the husband asks for a dissolution of the marriage
on the ground of his wife's adultery with a man unknown. F

The wife's suit was filed as long ago as Aug. 12, 1936, and in that suit
the husband pleaded, first, just cause for leaving his wife, and, secondly,
the existence of a separation agreement. The husband's suit was filed
on Jan. 17, 1938, and the evidence upon which he depends is that relating
to the birth of a female child born on May 26, 1937. The husband G
contends that he parted from his wife on or about Aug. 6, 1935, and that
in Sept., 1935, a separation agreement was arrived at as between himself
and his wife. The terms of this agreement are set out in correspondence
between solicitors acting for the two parties, and, according to the
husband's contention, the terms so arrived at have been observed by H
both parties. The husband and wife continued to live in the same town,
but in different parts thereof, and met only rarely, and for the most part
accidentally. Whilst living separated in this manner, the wife, on
May 26, 1937, gave birth to a child.

It was clear from the outset that, if the husband could make good

his contention that the child in question was the result of an adulterous association by his wife, all other matters concerned in these two suits would become of no importance, and it was accordingly agreed by counsel that this question should have precedence over the rest.

- Unhappily for the parties, the question to be determined is bristling with difficulties. Mr. Ettenfield is unprovided with any evidence of any kind concerning his wife's adultery, apart from such evidence as he might be allowed to give of non-access by himself at the material times. Mrs. Ettenfield, on her part, claims that the child was born in wedlock, and is the result of marital relations which had taken place between the parties in the autumn of 1936. As early as Dec. 4, 1936, six months before the birth of the child, a letter had been written by Woosnam & Co., the solicitors now acting for Mrs. Ettenfield, to J. Ogden, Hardicker, Hanson & Co., the solicitors acting for Mr. Ettenfield, claiming that the parties had met in Aug., 1936, and that marital relations had been resumed between them. The husband's solicitors immediately answered this letter by a denial that there had been any resumption of marital relations, and the matter appears to have been left there, without further comment on either side, until Mrs. Ettenfield wrote to her husband on June 1, 1937, announcing the birth of the infant.
- Obviously the first point to be determined is whether or not, in the circumstances, Mr. Ettenfield can be allowed to give evidence of non-access, in view of the rule laid down by the House of Lords in *Russell v. Russell* (1). Such evidence cannot in the generality of cases be received from a spouse. The courts have nevertheless recognised what may loosely be termed exceptions to the rule, but should perhaps be more correctly described as circumstances to which the rule has no application. It is not, I imagine, a matter of any doubt that, where parties have obtained a judicial separation, and are living apart by virtue of a decree properly so obtained, the rule can have no application. Indeed, there is authority for the proposition that, so far from the spouses being debarred from giving evidence of non-intercourse to bastardise the child, the infant in such a case is by presumption of law illegitimate, without any evidence of non-intercourse: *St. George's v. St. Margaret's, Westminster (Parishes of)* (2) and *Hetherington v. Hetherington* (3). The question as to whether the rule applies in cases where the parties are living apart under a deed of separation stands on more debatable ground. In 1926, BATESON, J., gave a brief but exceedingly clear judgment upon this subject in *Mart v. Mart* (4). No appeal was taken against this decision, and it has been followed without question, and, so far as I know, without exception, in this Division since that date. In 1935, LUXMOORE, J., in *Re Bromage, Public Trustee v. Cuthbert* (5), declined to follow the decision of BATESON, J., in *Mart v. Mart* (4), on the ground that that decision was in conflict with certain earlier cases of higher authority. Fortunately for me, I am spared any embarrassment which I might feel in having to choose between two guides, either of whom

I should be happy to follow, by the fact that a Divisional Court of the King's Bench Division in *Stafford v. Kidd* (6) has elected in favour of the decision in *Mart v. Mart* (4). I consider that I am bound by the decision of any Divisional Court, notwithstanding that the Division be not one to which I happen to belong. So far as I am concerned, therefore, I am bound to assume, following *Stafford v. Kidd* (6), that the rule in *Russell's* case (1) has no application where the parties are living apart under a deed of separation. A

It falls, therefore, to be considered whether or not the fact that the agreement to live apart was not enshrined in a deed of separation constitutes a distinction which would bring this case within the rule laid down in *Russell v. Russell* (1), and outside the circumstances in *Mart v. Mart* (4) and *Stafford v. Kidd* (6). To begin with, it is, of course, necessary to determine the facts. Counsel for the wife tenaciously contended that there was here no agreement to live apart. In face of the correspondence before me, and the admitted facts, I can only say that this contention struck me as an admirable example of the courage of counsel and the remarkable powers of self-persuasion which some women appear to be able to exercise. So far as the admitted facts are concerned, it will be remembered that Mrs. Ettenfield comes into court in this case as the petitioner in a suit for restitution of conjugal rights, and that, as her petition shows, her case is grounded upon the fact that Mr. Ettenfield left her in Aug., 1935, and has ever since refused to return to her. It is not in dispute, therefore, that the parties have actually lived apart since Aug., 1935, until the present day. As to whether that admitted parting is sanctioned by agreement, there has been put in evidence a lengthy and detailed correspondence between the parties and their solicitors. It will be necessary to make only a few brief excerpts from that correspondence to demonstrate the nature and extent of the agreement. B
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On Aug. 19, 1935, W. Banks & Co. initiated the correspondence by announcing to Mr. Ettenfield that they had advised his wife that "a formal separation agreement should be entered into." On Sept. 23, 1935, after lengthy and tiresome negotiations, W. Banks & Co. wrote a letter to the husband's solicitors containing the following expression : F
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You will appreciate that we wish to obtain the best terms possible for Mrs. Ettenfield without having to take the matter to court. . . . As you state that Mr. Ettenfield will increase his payments as his financial position improves perhaps you may agree that a formal agreement may be unnecessary, so that Mrs. Ettenfield will be at liberty to take the matter to court should she find that her husband was in a position to pay more, but was refusing to do so. H

To this letter the husband's solicitors replied on Sept. 26, 1935, as follows :

With regard to the last paragraph of your letter, our client will be prepared to dispense with a formal agreement, if your client will give her assurance through you, that in consideration of the payments she will not molest or interfere with our client and will not attempt to pledge his credit.

On Oct. 1, 1935, W. Banks & Co. concluded the whole of the negotiations with a letter which contained the following sentence :

We observe that you will dispense with a formal agreement and shall be glad if you will please put it to your client that the conditions he suggests are unnecessary.

A It should be noted that the suggestion of dispensing with a formal agree-
ment came in the first place from the wife's solicitors, and that they
employed the expression in their last letter : "... you will dispense
with the formal agreement. . . ." If it be possible to arrive at any
agreement which the wife would consider binding by anything short
of a deed, I should imagine that this correspondence constituted
B such an agreement beyond any shadow of doubt. Four-and-a-half months
later, however, Mrs. Ettenfield, having changed her solicitors, returned
to the charge, and instructed Rowley, Ashworth & Co. to write to her
husband, on Feb. 15, 1936, as follows :

C We have to inform you that your wife is anxious that you should return to her
and her children, and she has in fact suggested this course on many occasions. If
you are not prepared to return to her then we are to inform you that the present
position is unsatisfactory and unless you are prepared to enter into a proper separation
agreement giving our client custody of the children and undertaking to pay our
client the sum of 25s. per week, our instructions are to institute the necessary
proceedings against you.

As to this remarkable epistle, it should be observed that, under the
D agreement arrived at in Sept., 1935, Mrs. Ettenfield was given the custody
of the children and Mr. Ettenfield agreed to pay the sum of 25s. per week.
It was not alleged in this letter of Feb. 15, 1936, nor is it alleged now,
that Mr. Ettenfield ever failed in any particular in the performance of
all the terms of the agreement. Accordingly, it is not surprising that
E the husband's solicitors replied to the letter of Feb. 15, by suggesting,
on Feb. 19, that Rowley, Ashworth & Co. should obtain from W. Banks
& Co. the lengthy correspondence which they had already had with them
on the matter. On the day following this answer—namely, on Feb. 20,
1936—Rowley, Ashworth & Co. replied as follows :

F We have been instructed not to take any steps in this matter for the time being
and will if the necessity arises communicate with you again.

So far as the correspondence is concerned, this letter constituted the
termination of the brief appearance of Rowley, Ashworth & Co. upon the
scene of these troubles, and it is perhaps not difficult to guess why
G Mrs. Ettenfield found it expedient to employ a third set of solicitors,
Woosnam & Co., when she again entered into controversy with her
husband. I listened at considerable length, and I trust with a due
degree of patience, to everything which was said by and on behalf of
Mrs. Ettenfield upon the subject of this agreement. I appreciate that
H the correspondence to which I have referred opens with a complaint
by Mrs. Ettenfield that her husband had deserted her. I appreciate,
too, that there may well be a distinction between a negotiation to obtain
temporary terms for a deserted spouse and a negotiation concerning the
terms of a separation agreement. With all these points in mind, how-
ever, I am at a loss to imagine how anyone could arrive at any con-

clusion upon these facts and this correspondence, and the testimony of the spouses themselves, other than that an agreement to live apart was duly arrived at, and that the terms of that agreement have been faithfully carried out by Mr. Ettenfield.

In *Collis v. Collis and Thomas* (7), which came before me in 1933, I pointed out that it would be necessary, in order to raise a point concerning non-access under an oral agreement, that the agreement should be established beyond doubt and question. I do not wish to depart in the slightest degree from that view. On the contrary, I would repeat with emphasis that agreements of this character must be most carefully scrutinised if and when it is suggested that such important consequences as are here alleged flow from them. For my own part, I should always require to be satisfied beyond any doubt that a real and substantial agreement either started or confirmed a settled relationship completely different in kind from that of the customary marital cohabitation, and it is all the more essential that the existence and observance of the agreement should be beyond question where, as in the present case, the parties have continued to live in the same town, and are not precluded by distance from casual meetings.

Finding, therefore, as I do, that this agreement was both entered into and acted upon, the question of law arises for determination. So far as authority is concerned, there appears to be literally no direct guidance whatever. When one remembers that the rule in *Russell v. Russell* (1) was only formulated in direct terms in 1924, it is not altogether surprising that this point should not yet be covered by authority. The nearest thing to anything approaching a statement of judicial opinion upon the point is that contained in *Rimmer v. Rimmer* (8). HILL, J., in dealing with an intervention by the King's Proctor in that case, refused to accept an admission of adultery by the wife, made before justices and afterwards retracted, as admissible in evidence before him. The judgment does not purport to give the actual words used by the judge, but reports him as saying that, since there was no proof of an agreement to live apart, there was nothing to negative the presumption of law that the child to which the wife had given birth was the child of her husband. I am aware that this statement from HILL, J., has on more than one occasion been put forward as showing that, in his view, an agreement to live apart, even though not embodied in a deed, would suffice to alter the presumption of legitimacy, and thus remove the bar imposed by the rule in *Russell v. Russell* (1). I should feel very relieved if I could accept this *dictum* of HILL, J., as being the expression of his considered opinion, but it is obvious that he might just as well have been referring to an agreement by deed as to an agreement unaccompanied by a deed. I cannot, therefore, feel that I can accept this expression as a sure guide concerning his view.

In the absence of authority, one is, of course, thrown back upon a consideration of principle. To commence with the rule in *Russell v.*

Russell (1) itself, it is not quite easy to extract from the very full opinions in that case the exact principle upon which the rule was founded. Lengthy and repeated study of these opinions leads me to suppose that the main principle is to be found in the words used by the EARL OF BIRKENHEAD, at p. 698, that to hold to the contrary would be "to invade the very special sanctity inherent in the conjugal relation." A LORD FINLAY said, at p. 706 :

Very good reasons could be given for respecting the sanctity of married life in this matter, to use the phrase employed by LORD HALSBURY in a case to which I shall have occasion to refer further on. But the rule is absolute, and wisely so. It is not decent that husband or wife should give evidence to bastardise the issue of the wife during the marriage, however decorous the evidence might be in itself. B

Moreover, in *The Poulett Peerage* case (9), the EARL OF HALSBURY, L.C., used language upon which these opinions were expressly founded [p. 399]:

... as regards the rule which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be inquired into in any court of law. . . . C

I am the more moved to accept this reason as the underlying principle because, if accepted, the exceptions which have been admitted to, or grafted upon, the rule fall into logical sequence. For example, the exception in the case of a divorce *a mensa et thoro*, which is as old as *St. George's v. St. Margaret's, Westminster (Parishes of)* (2), the exception where the parties are living apart under a judicial separation (see *Hetherington v. Hetherington* (3)) and the further exception as to parties living apart under a magistrate's separation order (see *Andrews v. Andrews and Chalmers* (10)) fall into line as proper and just exceptions, since the sanctity of the conjugal relation has already been invaded, if not abolished, by judicial intervention. Upon the same lines, as it appears to me, an exception in cases in which a separation agreement has been arrived at can be justified on the ground that no very special sanctity can be claimed for a conjugal relation which the parties have agreed temporarily to renounce, so far as it lies in their power to do so. D E F

I find it difficult to perceive in what way an agreement such as the present one differs in principle from an agreement embodied in a deed. The deed in this case was dispensed with at the instance of the wife only in order to secure to her a greater freedom of action in the case of dispute arising concerning the augmentation of her husband's income. G It can hardly be contended that the sanctity inherent in the conjugal relation was in any way preserved by the husband's forbearance to insist upon a formal deed. It would rather seem to me that, if I have correctly apprehended the foundation of the rule, it could, and ought, to have application only where the parties are in fact cohabiting (in the broad sense of the word), or where they must be taken by presumption of law, and in the absence of evidence to the contrary, to be so cohabiting. H It is true that, as the EARL OF BIRKENHEAD points out in *Russell v. Russell* (1), at p. 698 :

It [the rule] is absolutely general in the comprehensiveness of its expression. It has no geographical qualification.

I do not, however, take this to mean that, in cases where cohabitation has, *ex concessis*, temporarily ceased, either by judicial *fiat* or by a legally binding *consensus* as to the parting, no exception could be allowed. No one pretends that there is any special magic attributable to a deed. It is a convenient method of expressing a binding agreement in solemn and enduring terms. It may be, and often is, an agreement from which A it is less easy to escape than it is from agreements more lightly arrived at, but it does not differ in essence, nor often in result, from other and less solemn forms of agreement. I cannot, therefore, see that, if it be right, as I am bound to believe it to be, to allow evidence of non-access in cases where the parties are living apart under a deed of separation, it is not B also right to admit such evidence, where an agreement to live apart has been agreed upon and performed, merely because that agreement has not taken the form of a deed.

It might have been imagined that, when the problem which I have stated above had been resolved, the remainder of this case would have C presented no difficulty. As it has turned out, however, the question of fact as between Mr. Ettenfield and his wife has caused me more, rather than less, anxiety than has the novel problem of law. The doubt which has been occasioned in my mind has not, however, been caused by distrust of Mr. Ettenfield, but by the unusual and unhappy demeanour of Mrs. D Ettenfield under cross-examination. To state the matter quite broadly, Mrs. Ettenfield's case was that, upon a date in Aug., 1936, which she was unable to determine exactly, her husband met her at the North Pier, Blackpool, and walked with her towards her home at Bispham, and that, on arriving near her house, she told him that she had visitors E staying there, whereupon Mr. Ettenfield persuaded her to go with him behind some empty houses on the edge of a golf course, and there to have relations with him. Upon another occasion, shortly afterwards, he again came to her house at Bispham, and had relations with her in the front room of the house. This in itself is a simple and straightforward F story, and one which Mrs. Ettenfield told simply and without undue elaboration in the witness-box. Mr. Ettenfield wholly denied it, and was easily and readily able to withstand cross-examination upon his denials. Mrs. Ettenfield, on the other hand, proved to be almost unsusceptible of G any cross-examination. She appeared to be incapable of concentrating her mind upon even the simplest form of question, and, although not apparently physically distressed in any way, wandered immediately into the most inconsequent details during her answers. In the course of a cross-examination which lacked nothing which the most experienced advocate could have added in the way of good temper, patience and H clarity, she appeared puzzled, rather than resentful, and bewildered, rather than surprised. Upon one subject not directly concerned with the matter of marital relations she broke down almost completely. A certain Mrs. Greet had been called, upon Mr. Ettenfield's behalf, to give evidence concerning an approach which Mrs. Ettenfield had made to

her apparently in order to find out something to the detriment of Mr. Ettenfield. Mrs. Greet gave her evidence well and convincingly before me, and, if it is to be believed, Mrs. Ettenfield is anything but the simple and rather confused person which she appeared to be in the witness-box. According to Mrs. Greet, Mrs. Ettenfield came to see her and put forward

A a proposal that Mrs. Greet should assist her to put her husband into a position of difficulty by providing evidence concerning his association with another woman. Mrs. Greet was surprised at this suggestion, but, being unwilling to turn out of her house a person whom she hardly knew, listened to Mrs. Ettenfield's proposal and even agreed to go to visit Mrs.

B Ettenfield in Bispham in order to further the ends proposed. Upon reflection, however, she thought better of joining in the plot, and, as is confirmed by letters passing between Mrs. Ettenfield and herself, declined to honour her engagement or to take any further steps to the detriment of Mr. Ettenfield. Mrs. Ettenfield, on her part, was completely unable

C to give any coherent account or intelligible explanation of her expedition to Mrs. Greet. I am satisfied that she was telling me nothing of the truth in regard to this incident, but I have been obliged to weigh carefully the consideration that, whilst she may have been deliberately untruthful concerning this subject because she was ashamed of a somewhat shady

D manoeuvre, it does not follow that she has been guilty of the far graver offence of inventing a perjured tale as a defence to her husband's suit for dissolution.

In *Morris v. Davies* (11), LORD COTTENHAM, L.C., at p. 215, referring to the opinion of LORD ELDON, L.C., as to legitimacy cases in *Head v. Head* (12), said that

E

... the court which is to be satisfied that sexual intercourse did not take place, must be so satisfied, not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt in the minds of the court or jury, to whom that question is submitted.

F I have felt to the full the urgency of this warning in a case such as the present one, in which there is nothing but the testimony of each of the two parties equally concerned to balance against one another. When one looks to extraneous circumstances, there is, as counsel for the wife pointed out, no corroborative evidence against Mrs. Ettenfield to be

G derived therefrom. There is no story of addiction to any kind of loose living, no familiarity, or even association, with other men, attributable to her, and no suggestion of indulgence in alcohol or of undue frivolity. There is literally nothing against her. For the purpose of this grave issue, it is a very minor matter that she appears somewhat insensible to her

H obligations under a bargain, and the fact that she has wandered from one solicitor to another may be attributable merely to lack of resources. Her version of the facts attending her intercourse with her husband is certainly surprising, but not incredible. I am thus really driven to a determination as between her husband and herself. If I entertained reasonable doubt, I should, of course, be bound to give Mrs. Ettenfield

the benefit of that doubt, but I cannot say that a full consideration of the case, making full allowance for possibly honest perplexity on the part of Mrs. Ettenfield in cross-examination, has left me in any real or reasonable doubt. Mr. Ettenfield has convinced me that at no time after he parted from his wife in 1935 did he have intercourse with her. Lest I should appear to have forgotten it, I should mention that other evidence was called before me on behalf of each side, but I have not noticed it in my judgment because it has played no real part in the decision at which I have arrived. A sister of Mr. Ettenfield gave evidence which may well have been true, but I felt obliged to discount it so heavily, on the ground of obvious personal dislike and family feeling, that I have not felt able to base my conclusion thereon. In view of the opinion which I have reached concerning the law, this finding of fact determines the issue in Mr. Ettenfield's suit. He is accordingly entitled to a decree *nisi* in his suit, and any other questions in issue between the parties will not, as I understand the matter, require to be further debated.

Decree nisi granted to husband.

Solicitors: *Boxall & Boxall*, agents for *Woosnam & Co.*, Blackpool (for the wife); *Gregory, Rowcliffe & Co.*, agents for *J. Ogden Hardicker, Hanson & Co.*, Manchester (for the husband).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

BAXTER v. F. W. GAPP & CO., LTD.

[COURT OF APPEAL (MacKinnon and du Parcq, L.JJ., and Macnaghten, J.), May 8, 9, 1939.]

Agency—Professional agent—Duty to use care and skill—Valuation of property—Advance by way of mortgage on footing of valuation—Negligence—Knowledge of locality—Reliance upon valuation—Measure of damages.

The defendant, an estate agent, was sued for negligence in making a valuation of property for the purpose of an advance by way of mortgage. It appeared that the defendant inspected the property but failed to make any local inquiries as to the value of that property or of similar properties in that locality. The defendant had not practised in the locality. The defendant also failed to inquire what price the property had realised upon recent dealings. The valuation was £1,800. The property had been purchased by the mortgagor for £600, and the highest price at which it had changed hands in recent times was under £850. Certain additions and alterations to the property were, at the time of the valuation, being made, and the defendant advised an advance of £1,200 upon first mortgage, subject to £200 being retained pending the completion of the additions. The defendant subsequently advised an advance of £150 on second mortgage. This valuation was given to the plaintiff's solicitors, who subsequently discovered the price the property had realised in recent transactions, and also received a suggestion from a local agent that the value was too high:—

HELD: (i) the valuation made by the defendant was an excessive one, and had been made without the exercise of that degree of due care which an expert ought to bring to his task.

(ii) the measure of damages was the whole loss sustained by the plaintiff, and included the expenses of abortive sales, insurance premiums,

builder's account for the upkeep of the property, mortgagee's expenses and disbursements, and the agent's commission upon the ultimate sale of the property, in addition to the principal advanced and the interest unpaid.

Decision of GODDARD, L.J. ([1938] 4 All E.R. 457) affirmed.

- A** **[EDITORIAL NOTE.]** The judgments herein discuss at length the duty of a professional man called upon to give professional advice. The particular profession in this case is that of estate agency, but in a general way the same principles apply to other professions. The facts of the case entail a consideration of the duties of an estate agent when called upon to value a property outside his own area and in a district in which he has had no previous experience of the valuation of properties.
- B** The judgments include an examination of the measure of damages in such a case, and in general decide that all the expense and loss to which the mortgagee has been put, or which he has suffered, are to be included in the assessment.

AS TO AGENT'S DUTY TO USE CARE AND SKILL, see *HALSBURY*, Hailsham Edn., Vol. 1, pp. 244-246, paras. 416, 417; and FOR CASES, see *DIGEST*, Vol. 1, pp. 433-435, Nos. 1239-1266.]

C Cases referred to :

- (1) *Scholes v. Brook* (1891), 64 L.T. 674; 43 Digest 1044, 26; *affg.* (1891), 63 L.T. 837.
- (2) *Lowenburg, Harris & Co. v. Wolley* (1895), 25 S.C.R. 51; 1 Digest 433, case 1245i.

D

APPEAL by the defendants from a decision of GODDARD, L.J., sitting as an additional judge in the King's Bench Division, dated Nov. 16, 1938, and reported [1938] 4 All E.R. 457, where the facts are fully stated.

- E** *Lionel F. Heald, K.C.*, and *Michael E. Rowe* for the appellants.
J. P. Eddy, K.C., and *Harold I. Willis* for the respondent.

Heald, K.C. : No action will lie in respect of a professional opinion, however wrong it may be, unless it can be shown that it is so wrong as to amount to no opinion at all. The measure of damages in a case of this sort is the difference between the valuation made by the defendant and the actual value at the time : *Lowenburg, Harris & Co. v. Wolley* (2). [Counsel referred to *Scholes v. Brook* (1).]

F

Rowe followed on the same side.

Eddy, K.C., was not called on.

G

MACKINNON, L.J. : This is an appeal from a judgment of GODDARD, L.J., sitting as an additional judge of the King's Bench Division, in an action in which the plaintiff sued the defendant company and the defendant Frank William Gapp for damages for negligence in acting as valuers of property, as a result of which the plaintiff, in reliance on that valuation, advanced money by way of mortgage.

H

In July, 1935, a firm of mortgage brokers with a foreign-sounding name in the city approached the defendants stating that they had a client who wished to borrow money on mortgage. In consequence of that, the defendants communicated with the solicitors for the plaintiff

by a letter of July 4, and those solicitors replied that they had a client wishing to lend money on mortgage, and said :

... on the understanding that you have no interest in the matter beyond the survey, we should be happy to instruct you to make a survey on our client's behalf.

The defendants gave them that assurance on the telephone, as appears from a postscript to the letter of July 9, where the defendants wrote as follows :

We confirm the writer's conversation with your Captain Douglas-Mann that we have no interest in this matter beyond survey.

In those circumstances, the defendants were entrusted with the duty of making a valuation with a view to the plaintiff acting upon it in lending money.

On July 19, the defendants sent a report to the plaintiff's solicitors :

In accordance with your instructions, we have inspected, surveyed and valued the above property [Garden Lodge, Derek Road, Maidenhead].

They then give a description of the various contents, the size and number of the rooms and so forth, and continue as follows :

We have carefully considered the market value of this property, and having taken all matters into consideration, we value this freehold property . . . in the sum of £1,800, assuming, of course, the property is free from land tax and tithe, and we are therefore prepared to advise, having regard to the Trustee Act, 1925, that the sum of £1,200 be advanced on first mortgage, subject to the amount of £200 being retained until the alterations and additions as above mentioned are completed and passed by us, and we consider this property a reliable trustee security for an advance of this figure.

The plaintiff was disposed upon that report to entertain this suggestion that he should advance £1,200, and his solicitors were instructed to see to the matter. When they received the abstract of title of the mortgagor, they were surprised to find that she had bought it for £650 in 1934, and that, at a previous date in 1925, it had been sold for £730. They therefore communicated those facts to the defendant, and asked him whether he still confirmed his valuation. I am not sure whether they suggested that he should make some inquiries of a local agent, but, whether they did or not, the defendant did communicate with a Mr. Humfrey, who was a local house agent at Maidenhead. Mr. Humfrey appears to have given him a very uncertain sort of estimate. He did not go inside the house, it is said, but he went and looked at it and he told the defendant that he thought that it was worth from £1,200 to £1,600, which is a very remarkable range of valuation. As the judge pointed out, there is a difference of 25 per cent. between his lowest and his highest figure. However, the defendant, notwithstanding these queries raised by the plaintiff's solicitors and his communication with Mr. Humfrey and that rather doubtful confirmation of his view, stuck to his original valuation of £1,800 and confirmed it. Thereupon the plaintiff went on with the business. He agreed to lend £1,200. The original suggestion was that it should be at $4\frac{1}{2}$ per cent. interest, but that was altered and it was made 5 per cent. Of the £1,200, he paid £1,050

at once. The remaining £150 was not to be paid over until the alterations then in progress were completed. That was eventually done. That is recorded by a letter of his solicitor to the plaintiff on Aug. 30, 1935. The mortgage, therefore, on the strength of the defendant's valuation, was carried out.

- A Very soon the mortgagor, a Miss Holley, turned out to be a highly unsatisfactory person. She paid, I think, only a half-year's instalment of interest. She failed to pay the proportionate part of capital which, under the mortgage, fell to be repaid, and thereafter she paid nothing at all and disappeared, leaving the place shut up and letting the garden
- B go to rack and ruin, so that the position of the plaintiff was very serious. Eventually, on Apr. 6, 1937, I think by breaking a window and so opening it, the plaintiff managed to get into possession of the property. Thereupon he made strenuous efforts to sell the property as soon as he could. On June 13, 1937, through Mr. Humfrey, the local
- C agent, he attempted to sell it at auction. There have been put in evidence the particulars, which were adorned with the usual skill of the house agent in the way of laudatory epithets, and it is said that £14 or £15 was spent in advertising this auction. When the day came and the sale of this property was attempted, not a single person would make any
- D bid at all for Garden Lodge. Through various agents, the plaintiff then made further efforts to get a purchaser for the house. He received some derisive offer of £680, and several lower sums, and eventually, in Nov., 1937, he managed to sell it by private treaty to Mrs. Rapozo for the sum of £850.
- E That being the plaintiff's position, on Nov. 11, 1937, he issued his writ in the present action, claiming that the valuation of £1,800 made by the defendants as the basis of the mortgage was negligent, in that that sum was excessive, that thereby he suffered damage in having lent his money, and that, in the circumstances, he entirely failed to recover
- F his capital, except to the extent of the £850 which he received from Mrs. Rapozo, and also lost the interest in the meanwhile. Those, in brief outline, are the facts.

- Prima facie*, as it seems to me, the fact that, despite the efforts of the plaintiff, assisted by various advisers, he could in 1937, acting, as I think,
- G reasonably, get no higher figure for this property than £850 is some evidence, and, indeed, is strong evidence, that the valuation of £1,800 two years before was excessive. Of course, the difference might have been explained away if there had been any evidence on the part of the defendant either that, through economic circumstances, property in
- H general had fallen in value between those dates, or that some particular circumstances had affected the value of property in Maidenhead, but it is highly significant that no evidence at all of that sort was given either on behalf of the defendant or by the defendant himself. In addition to what I have said is *prima facie* evidence afforded by the price which the plaintiff was able to get two years later, he called the evidence

of two experts, the first of whom was a Mr. Giddy, a member of a firm practising in Maidenhead, who put the value in July, 1935, at only £900. He also called another experienced gentleman who put the value at £1,150. As the judge has said, Mr. Hunt, who gave evidence for the plaintiff with some care, put it as high as £1,150, but that was the high water mark, from Mr. Gapp's point of view, of the evidence which was called by the plaintiff. A

On the other side, there was evidence from the defendant Mr. Gapp himself, and from an expert, Mr. Milne. Mr. Gapp explained that he had arrived at his figure of £1,800 by going to see the house, estimating its rental value as £100 per annum, and multiplying that by eighteen. It was pointed out to him that the rateable assessment of the property was only £45 gross and £35 net, but, of course, that was before the additions were made by the mortgagor. The other method of calculation which Mr. Gapp sought to employ, thereby arriving at the same figure of £1,800, was to take the cubic contents of the building and multiply the cubic feet of the actual building itself by 1s. 6d. and the cubic contents of the porch and loggia by 6d. That worked out at about the same figure of £1,800, but, so far as I have followed the evidence, which I have read with care, it seems to be very difficult to see why the 1s. 6d. for the inside and 6d. for the outside portions are any guide at all to the value of a house in Maidenhead, or why that particular figure should have been considered. The other evidence for the defendant was that of Mr. Milne, the expert. He was unable to support the valuation of £1,800. He was asked by GODDARD, L.J. : B C D

The question is would you have put a valuation on it of £1,800, having heard Mr. Gapp's evidence and having seen what you have seen?—I am doubtful if I should have put as much as that on it. E

Counsel for the defendants then said :

I am sure you will do everything you can to assist the court.—I think Mr. Humfrey's figure of £1,600 is about what I should have expected this house to fetch in good condition, and if properly introduced in quarters where purchasers were likely to be found. F

That being the state of the material parts of the evidence, it seems to me, not only that the judge was abundantly justified in coming to the conclusion that £1,800 was an excessive figure as the value of this house, but also that, having regard to the way which Mr. Gapp described as his means of arriving at it, it was not only an excessive figure, but one arrived at without that degree of due care which an expert in such matters ought to bring to his task. It must not be forgotten, in regard to that, that Mr. Gapp was not possessed of, and did not profess to have, any special knowledge of the conditions of the property market in Maidenhead, and it is significant that, when he did apply to such a local expert, Mr. Humfrey, he got only the information which I have indicated. In those circumstances, not only do I think that the judge was perfectly justified in coming to the conclusion that the charge of negligence was made out, but also I am satisfied that it is the only conclusion G II

to which he could have come, and the one to which I should have come, upon that evidence.

A There remains the question of the damages to which the plaintiff is entitled. The judge has assessed them on the basis of the fact that, by reason of this excessive valuation, the plaintiff was induced to enter upon this enterprise of lending this money, which he would not have done but for the valuation. As a result of lending this money upon this mortgage, he has sustained a certain pecuniary loss—namely, the loss of his interest during 2 years and the loss of his capital, so far as it has not been repaid by the price paid by Mrs. Rapozo. That resulting figure—amounting to £720, I think—the judge has awarded the plaintiff as damages. In principle, apart from any authority, it seems to me that that is the right basis on which to assess the damages. Curiously enough, there is no very clear authority. There is one case, *Scholes v. Brook* (1), which was a similar claim against valuers for negligence. ROMER, J., as he then was, gave judgment for the plaintiff, and awarded damages. In the report of the case before ROMER, J., the basis upon which he assessed the damages is not clearly shown, because the report merely ends as follows, at p. 838 :

D His Lordship reviewed the evidence, and, having decided that the valuation by Messrs. Brook and Dransfield was not carried out with proper care and skill, gave judgment against them for damages.

In the Court of Appeal, so far as the judgment goes, LINDLEY, L.J., is only reported as saying at p. 674 :

E . . . he was therefore of opinion that the mode of estimating the damages adopted by the judge was correct.

One can only infer and discover the basis so approved and adopted by the judge below from a passage in the body of the report and the argument for the appellants. The statement of facts in the body of the report is as follows at p. 674 :

F His Lordship gave damages to the plaintiff, representing the whole loss he had sustained through the deficiency of the security.

The defendants appealed.

Haldane, Q.C., and *Oswald*, for the appellants, contended on the evidence that the appellants were not employed by the plaintiff ; and also that the measure of damages (if any) ought to be the difference between the value of the estate as stated by the valuers and the real value at that time.

G That seems to indicate that ROMER, J., had adopted the same basis of assessing the damages as that employed by GODDARD, L.J., in this case. That was approved by LINDLEY, L.J., as the proper measure of damages. Therefore, as I have said, I think that the principle is right, and, as far as authority is available, that seems to confirm it.

H We were referred by counsel for the appellants to the only case which he has been able to find, the discovery of which indicates great industry on his part. It is a decision of the Supreme Court of Canada in *Lowenburg, Harris & Co. v. Wolley* (2). That was a similar claim. The headnote is as follows :

The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land.

It is obvious that in that case the mortgagee, having got into possession, was still in possession, and had been quite unable to sell the property at all. Therefore, when the court said that the measure of damages is the difference between the amount loaned and the actual value of the land, supposing that the amount lent was £1,000 and the actual value, which he had not been able to ascertain, because he had been unable to sell, was £500, he would get the difference—namely, half of what he had lent. That, in effect, is the same basis of assessing the damages as that adopted by the judge in this case, the only difference being that in this case the value of the land to the plaintiff has been ascertained by his sale to Mrs. Rapozo. That the same basis of assessment—namely, what the plaintiff has lost by being led into this disastrous investment—should be employed is shown by the fact that the judge in the court below, whose judgment was affirmed by the Court of Appeal, had said that the plaintiff should recover the whole amount of his advance, and should assign to the defendants the land, so that they could do what they could to realise its value and so mitigate the loss. That would be a process which would achieve the same result as that which, as a matter of principle, the Court of Appeal was laying down as the proper basis of damages, and the same result as that which, I think, GODDARD, L.J., rightly applied, and which should be applied, in the present case. In the result, I think that this appeal fails, and must be dismissed with costs.

DU PARCQ, L.J. : I entirely agree. I would add a few words only because, as counsel for the appellants has rightly said, this is a case of some importance both to people in the same profession as that of Mr. Gapp and to the public. It is, of course, quite clear that the mere fact that there is an overvaluation does not of itself show negligence. Gross overvaluation, unless explained, may be strong evidence either of negligence or of incompetence. I have no doubt that there was in this case gross overvaluation, and one looks to see whether or not there is any explanation of it, and whether or not it can be seen that the defendant has failed to take any steps which he ought to have taken, or to pay regard to matters to which he ought to have paid regard. I think that, upon investigation, one finds that it is quite plain that he paid no regard to matters which were of the most vital importance. I think that it is an important feature of the case that Mr. Gapp admittedly had no special knowledge of the value of property in Maidenhead or that district, although no doubt he is an experienced valuer generally speaking. It is plain enough, I think, that, if one can imagine a valuer being taken blindfold to some destination unknown to him and then led into a house and asked to value it, he would quite properly say: "Before I value this house, you must tell me where I am. You must tell me where it is situated. Is it in a town, or near a town? Is it in a suburb? Is it near the sea, or is it near a river?" Then, having been told that,

unless he knew the place, he would desire to make inquiries as to the value of local properties. That seems to be elementary, and common sense. It follows, therefore, that, if a valuer has no local knowledge, he must inform himself. I find that these questions were put by counsel for the plaintiff to Mr. Gapp at the beginning of the cross-examination :

You heard Mr. Hunt, the surveyor whom I called yesterday, say this to my Lord :
" In making valuations of this kind, if you practise in London and not at Maidenhead, the proper precaution is to go to the local agents and find what other properties in the neighbourhood are on their books and what prices are being asked." Do you agree with that statement ?—I telephoned Mr. Humfrey the following day.
I am not going to hurry you at all. First of all, do you agree with that statement ?

GODDARD, L.J. : That you should make inquiries from local agents ?—Yes.

It is not clear whether Mr. Gapp intended to agree that one should find what other properties were on the books of the agents, though I presume that he did, but he certainly agreed that one should make inquiries from local agents. If inquiries which were at all full and complete had been made, one of the facts which would have been elicited would have been that in the same road as this bungalow, and, indeed, just opposite to it, there was a house of about the same size, with a tennis-court as well, which is usually regarded as an attraction to a purchaser, and a frontage to the creek, which, I suppose, would be an advantage, which had been in the market since 1934, for about 4 years, and was still unsold, and for which the price which was being asked was £1,200. It is perfectly true, as counsel for the appellants said to us, that there may be some explanation.

There may be things to be said against that house. We do not know. On the face of it, however, it is a very striking fact, and I cannot for myself understand how any valuer could shut his eyes to it, because the ordinary person, if told that a larger, and, on the face of it, more attractive, house was being offered for £600 less than Mr. Gapp's valuation, and that no one had been found to buy it, would say that it tended very strongly to show that Mr. Gapp's valuation was very excessive.

Further, there was another house on the opposite side of the road, a smaller house, which had also been in the market since 1934, and which was apparently not entirely dissimilar to this, except that it was somewhat smaller. The price being asked for that house was £850, and there again no one had come forward to buy it. Those facts were never ascertained by Mr. Gapp, and he took no steps to ascertain them. He seems to have made no inquiries as to any properties in the neighbourhood. He said in his evidence that the prices given for other property might be very misleading, because the property might have been sold at some very low price for some special reason, and, of course, that might have been. No doubt inquiries are necessary to ascertain whether or not that is the case. Nevertheless, one cannot explain in that way, where another explanation may be available, the fact that nobody has offered to buy at the price asked a property which has been in the market for 4 years. That, as I have said, was ignored by Mr. Gapp. He refused

to pay any attention at all to rateable value, although, when all allowances are made, that is an indication, at any rate, of the value which experienced people are putting upon the houses in the neighbourhood. He made his valuation, I think it is fair to say, merely by a guess. Having made it, he discovered that Mr. Humfrey, the local valuer—without going carefully into the matter, it is true, and without apparently supplying any data of his estimate—said that the very highest at which he could put it would be £1,600, and he started with a figure of £1,200. One would think that a cautious valuer might have thought that £1,200 was the safer estimate to take, and, if so, we have the very startling difference of £600 between Mr. Humfrey's lower estimate and the estimate which Mr. Gapp put forward in order that the plaintiff might act upon it and risk his money upon it

In those circumstances, I agree with MACKINNON, L.J., that there was abundant evidence on which GODDARD, L.J., could find that there was negligence on the part of the defendant, and I also am of opinion that any other conclusion on this evidence would be wrong. I have nothing to add on the question of the measure of damages, as to which it seems to me that we are bound by the decision of this court in *Scholes v. Brook* (1), a decision which, if I may say so, seems to be in accordance with principle. I agree that this appeal should be dismissed.

MACNAGHTEN, J.: I am of the same opinion. The disparity of £950 between the valuation of £1,800 made in July, 1935, and the best price which could be obtained for the property when it was put to the test of sale in Mar., 1938, less than 3 years after the valuation, is certainly startling, and calls for an explanation. There might have been some such explanation as has been suggested by MACKINNON, L.J.—a general fall in values, and particularly a depreciation in the value of bungalows in Maidenhead. No such evidence was given. It was said on behalf of the defendant that, after all, valuations are mere matters of opinion. Some people are optimists, others are pessimists. Mr. Gapp was an optimist in the matter of the value of Garden Lodge. The explanation which commended itself to the judge of this disparity between the valuation and the price was that in fact Mr. Gapp did not know about the value of property of this class in Maidenhead. There was ample evidence to justify that conclusion. Indeed, on the evidence, no other conclusion was really possible. GODDARD, L.J., said at the very beginning of his judgment that a person who undertakes the duty of valuing property holds himself out as possessing the necessary experience and skill required for the discharge of that duty. It seems plain on the evidence that Mr. Gapp did not possess that knowledge and experience which he ought to have possessed. By reason of his lack of that knowledge and experience, he made this overvaluation, whereby the plaintiff has suffered loss. The plaintiff is, therefore, entitled to recover the loss which he has sustained owing to the breach of duty on the part of Mr. Gapp. I agree

that the appeal must be dismissed. As to the damages, I think that they were rightly assessed by the judge.

Appeal dismissed with costs.

Solicitors: *Nordon & Co.* (for the appellants); *Barnard, Taylor & Douglas-Mann* (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., *Barrister-at-Law.*]

**Re AN ARBITRATION BETWEEN COURT LINE, LTD., AND
CANADIAN TRANSPORT CO., LTD.**

[COURT OF APPEAL (Scott, Clauson and Goddard, L.J.J.), **May 1, 2, 3, 1939.**]

Shipping—Charterparty—Construction—Loading—Subject to supervision of captain—Shipowners to give benefit of insurance “as far as club rules allow”—Rule giving insurers rights against third parties and rule restraining assignment.

By a time charter the charterers agreed to load a cargo at their own expense subject to the supervision of the captain. The charterparty contained a provision that, in the event of damage to the cargo, the shipowners would give the charterers the benefit of their insurance, so far as the rules of the insurers allowed. Damage was caused to a cargo of grain through the stowage of a quantity of unseasoned timber on top of it. The shipowners paid a sum of £101 in respect of that damage to the holders of the bills of lading, and in the present proceedings they claimed that sum from the charterers. The charterers resisted this claim, on the ground that they were not liable, as the shipowners were bound to give them the benefit of their insurance. Against this, it was contended that the rules of the insurers did not allow this, as those rules provided that the insurers could recover from third parties any damages due to “such neglect,” and that no assignment of the cover to charterers or any other person should be deemed to bind the insurers:—

HELD: (i) the words “under the supervision of the captain” did not shift the liability for improper stowage to the shipowners.

(ii) (GODDARD, L.J., dissenting) the words “as far as the club rules allow” rendered inoperative the clause giving the charterers the benefit of the owners’ insurance, since the rules provided that the insurers were entitled by way of subrogation to enforce the insured’s rights against third parties including charterers.

[EDITORIAL NOTE.] In a dissenting judgment, GODDARD, L.J., has construed the contracts in this case in accordance with the rule that, *prima facie*, a provision in an insurance contract does not prevent the insured making any contract he pleases with third parties. Whatever rule of construction is applied to them, the clauses present a very difficult problem, and, as the case is apparently to go on appeal to the House of Lords, the decision of the ultimate court of appeal will be awaited with interest.

AS TO STIPULATIONS IN CHARTERPARTY AS TO LOADING, see HALSBURY, Hailsham Edn., Vol. 30, pp. 336, 337, para. 517; and FOR CASES, see DIGEST, Vol. 41, p. 348, Nos. 1975-1977.]

Cases referred to:

- (1) *Brys & Gylsen, Ltd. v. Drysdale (J. & J.) & Co.* (1920), 4 Lloyd L.R. 24.
- (2) *Harris v. Best, Ryley & Co.* (1892), 68 L.T. 76; 41 Digest 564, 3886.

APPEAL AND CROSS-APPEAL from a judgment of LEWIS, J., dated Nov. 9, 1938. The facts and the relevant clauses of the charterparty and the insurance rules are fully set out in the judgment of SCOTT, L.J.

A. A. Mocatta for the appellants.

Sir Robert Aske, K.C., Cyril T. Miller and Richard Hurst for the respondents. A

SCOTT, L.J. : This is an appeal from a judgment of LEWIS, J., who gave his decision upon a special case stated by an arbitrator, Mr. Willink. The arbitration took place pursuant to, or by agreement between the parties in connection with, a time charter of a vessel named the Ovington Court, dated Jan. 28, 1937, by which the owners of that ship agreed to let her to time charterers for a round voyage from Rotterdam to the west coast of North America and back to Europe—that is, to load cargoes outwards and homewards. The time charter was the government form in which the ordinary provisions are inserted, and in particular a provision, very common in time charters, requiring the master to sign bills of lading as presented. B

At the loading port on the west coast of North America, a grain cargo was taken on board, and also timber stowed on the top of that grain cargo. The timber was unseasoned and full of sap, and the dampness of the timber caused damage to the grain. In the result, parcels of grain shipped under bills of lading were damaged to the extent of £101 3s. 4d. The holders of the bill of lading on this side on the return voyage claimed from the ship, and that claim was paid in full in circumstances which I will mention presently. Having paid that claim to the bill of lading holder—payable because the cargo had been damaged by reason of improper stowage—the shipowners then turned round and sought, in circumstances which I will detail in a moment, to enforce against the charterer the liability to indemnify the shipowners which always arises where a shipowner incurs liability to bill of lading holders through signing a bill of lading at charterer's request, and the reason of the liability being incurred is some act done by the charterer which he is not entitled to do under the terms of the charterparty. That is the simple basis of the arbitration which took place over this matter. However, the form of the arbitration was not that. The form of the arbitration was complicated by another provision of the charterparty which brought in the protection and indemnity rights of the shipowner with the West of England Protection and Indemnity Association, of which he was a member. Those rights were made material to the elucidation of the relations between owner and time charterer by cl. 8 in the time charter, which provided, so far as material, as follows : C

The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment or agency ; and charterers are to load, stow, and trim the cargo at their expense under the supervision of the captain, who is to sign bills of lading for cargo as presented, in conformity with mates' or tally clerks' receipts. Owners to give time charterers the benefit D

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of their protection and indemnity club insurances as far as club rules allow, and in case of shortage or damage to cargo, charterers to bear the franchise according to the club rules, which owners would have otherwise borne.

When the owners received their claim from the bill of lading holders, they communicated with the West of England Club, and the club, to save unnecessary inconvenience, paid the claim direct to the bill of lading holders—a claim of £101 3s. 4d. In that way, the owners incurred at that time no out-of-pocket expense. However, the club, on making the payment, expected as insurers to have the benefit of subrogation to the owners' right of recourse under the charterparty against the time charterers under their obligation to indemnify the owners pursuant to the terms of cl. 8 against the liability which they themselves had caused to be put upon the owners by reason of the negligent stowage, which had been carried out by them. When, however, the owners duly made their claim against the time charterers to pay under that obligation to indemnify, the latter's reply was that, under the second part of cl. 8, the owners had undertaken to give them the benefit of their club insurance, and that, that being so, and the club having paid, the effective result was to free them from any obligation, because, if they were called upon to pay under their obligation to indemnify the owners, they would get nothing out of the clause by which the owners undertook to give them the benefit of their club insurance. However, a further aspect of the position then came up for consideration. *Prima facie*, when an insurer, whether under a policy or as a club of mutual insurance, pays a loss under the contract of insurance, the insurer is entitled to stand in the shoes of the assured and to enforce by way of subrogation any rights of recourse which the assured may have against any third party who caused the loss, and to become responsible to him for that loss. So we may assume, although we have not seen the correspondence, that in the present case the club called upon the owners, its member, to enforce their right of indemnity against the time charterers, and that that is how the arbitration arose in the present case. The arbitration took place, and the award was made in the form of a special case. The arbitrator, having stated the facts about the making of the time charter, quotes cl. 8, or that part of it which I have read, and then proceeds to the interpretation of the second half of the clause, which contains the following provision :

Owners to give time charterers the benefit of their protection and indemnity club insurances as far as club rules allow . . .

For that provision, it is, of course, necessary to read into cl. 8 all the rules of the club which are relevant to it.

The question in the case which was before the arbitrator and the judge below, and is now before us, is one of interpretation, and one of interpretation only, and the question turns entirely on the true construction of this one clause, which, of course, has to be construed in the light of the charterparty as a whole.

The arbitrator sets out in his award parts of the club rules. The rights of membership are given to owners under two sections of the rules, one called "Protection" and the other "Indemnity," two general words which are in use in mutual marine insurance which have no very clear definitions, because there is no very clear borderline between the two, but "liability to bill of lading holders" is a claim which is usually treated as an indemnity claim. Rule 2 reads, so far as it is relevant, as follows : A

The members are protected and indemnified as shipowners in respect of losses or claims arising without their actual fault or privity, which they shall have become liable to pay, and shall have in fact paid as follows. . . .

Then there are numerous paragraphs dealing with the general head of "Protection." The typical case of protection is the remaining quarter of the collision clause of an ordinary marine policy on hull. Then the rule passes to the section of "Indemnity," and under subrule (i) provides as follows : B

For other claims [other than "protection" claims] arising in respect of the shipment, carriage, discharge or delivery of goods or merchandise, arising through other causes than "improper navigation," the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents the association shall be entitled to . . . recover for its own account from third parties any damages that may be provable by reason of such neglect. C

I think that it is convenient to pause for a moment there and think what the meaning of that one part of the rules is, as applied to the circumstances of this case. Here the stowage of the cargo—the loading of the ship and the arrangement as to how the cargo should be stowed—had all been carried out by the time charterers under the provision of cl. 8, which I have already read, which says that the charterers are to load, stow, and trim the cargo at their expense. In fact, they did it negligently or improperly, whichever word one chooses to use, with the consequence that damage was unnecessarily caused to the grain and the shipowner was put under liability to the bill of lading holders, because, although the charterers did the stowage, the ship was responsible for the stowage to the bill of lading holders. The first step towards construing cl. 8 of the charterparty is to ascertain the true interpretation of r. 2 (i) of the club rules, which provides as follows : D

. . . the association shall be entitled to . . . recover for its own account from third parties any damages that may be provable by reason of such neglect. E

The meaning of that sentence, as it stands there, is, in my view, quite clear. If, in an ordinary time charter, the owner incurs liability to bills of lading holders by reason of the charterer calling upon the captain to sign bills of lading which put a liability on the ship brought about improperly—that is to say, in breach of the charterer's duty to the owner, by the conduct of the charterer—then, *quoad* the insurers of the owner against the risk of that liability, it is beyond doubt that the charterer is, within the meaning of the second half of r. 2 (i), a third party liable to the owner for damages provable by reason of the time charterer's neglect. In other words, that subrule says that the associa- F

tion shall be entitled to recover for its own account from third parties in such circumstances. The sentence is, so to speak, a rider upon the first half of the rule. The first half of the rule insures the owner with the club against the risk of claims for bad stowage brought by bills of lading holders against the ship, and the only construction I can put upon the second half of the rule is that it is a stipulation made by the club that the club's right of enforcing the owner's claim for indemnity against time charterers in such circumstances shall be preserved for the benefit of the association when, after the owner has been paid by the association, the association desires to enforce its right of subrogation to stand in the shoes of the assured, and gather in those rights of recourse possessed by the assured against third parties which an insurer is entitled to put in his own pocket by way of reduction of his liability under his insurance obligations.

There is another rule, to be found towards the end of the rules—namely, r. 17—which may throw light on r. 2 (*i*). Rule 17 reads as follows :

No assignment or subrogation by a member of his cover with this association to charterers or any other person shall be deemed to bind this association to any extent whatsoever.

In order to construe that rule, I think it is well in the first instance to omit the words "or subrogation." Omitting those words, the rule is a rule which forbids assignment by a member of his cover to charterers or anybody else. The insertion of the words "to charterers" specifically in r. 17 seems peculiarly appropriate to the solution I have suggested of r. 2 (*i*). I have pointed out how the claims by bills of lading holders against the ship are very often, in fact, brought about through the negligence of charterers, by reason of the ship being called upon by charterers to sign the bills of lading, and how, normally, whenever that happens, there is a right of indemnity which accrues to the owner against the charterers. Rule 17, to my mind, quite clearly says that no member shall be allowed to give to charterers any assignment of his rights of insurance cover by the association in such a way that the association will be prejudiced thereby. Those words are not expressed, but, to my mind, it is plain that one object of r. 17 is to prevent the club from losing its right of subrogation after payment to the assured, its member. Those two rules taken together, r. 2 (*i*) and r. 17, to my mind quite clearly provide, first, that the member-owner of the club is not entitled to give away to third parties, such as charterers, his right to recover from the third parties, and, secondly, that the association shall in all events remain entitled by way of subrogation to enforce the member's right of recourse against all third parties including charterers.

If that be the right meaning of those rules, what is the meaning of the second part of cl. 8 of the time charter, which provides as follows :

Owners to give time charterers the benefit of their protection and indemnity club insurances as far as club rules allow, and in case of shortage or damage to cargo. . . .

Ex hypothesi, by reason of the interpretation which I have just put upon those two rules, the owner is required by the club to preserve to the club his right of recourse against the time charterer for an indemnity, and to the extent of that right of recourse the owner is prevented by the club rules from giving to the time charterer the benefit of his insurance with the club. Therefore, under this rule the time charterer cannot claim the benefit of the club insurance if a claim to that effect would in any way take from the club its effective right to recover for its own account from third parties—that is to say, from the charterers—the damages which were payable to the bill of lading holders by reason of bad stowage. Therefore, under that clause, for that reason, if the right of indemnity of the owner from the time charterers extended to the whole amount of his liability to the bill of lading holders, then the answer to the question how far the club rules allowed the time charterers to have the benefit is, “to no extent,” because the benefit and the right of recourse by way of the indemnity were equal. The right to recover from the time charterers was a right to recover the whole amount which the owner had to pay to the bill of lading holders and which he recovered from his club. In the same way, in my view, if the time charterer says that the effect of the clause in the charter is to give to him the benefit of the member’s cover with the association, that interpretation would bring the time charterer into collision, so to speak, with r. 17, which says that the member shall not assign his cover with the association to charterers. So that for those two reasons, which support each other, I think that the true view of the position is that there was an undertaking by the member that he would not give away any rights of recourse he might have, so as to deprive the club of its right of subrogation upon payment of a claim by way of indemnity under the indemnity section, and particularly under r. 2 (i). Further than that, however, I think that the preservation of the club’s right of subrogation—a preservation of the right of recourse against the time charterers—was a condition which was introduced into the charterparty contract as between the owner and the time charterers. The result of that condition can be expressed by interpreting the clause thus: “Owners will give to time charterers the benefit of their club insurances in case of shortage or damage to cargo if the rules of the club permit that to be done, but if the rules of the club do not permit that to be done, then this undertaking to give the time charterers the benefit of the insurance will have no application.” The promise to give it is conditional upon the club rules allowing it, and, if there is a condition in the club rules which forbid it, then, *ex hypothesi*, it cannot be done. That seems to me to be the plain meaning of the clause in the charter, and, if so, then the effect of it is that the time charterers in this particular case do not show that there was any benefit from the insurance which the club rules allowed them to receive from the owner.

There is one more point which I want to mention before I return to

the award. The last part of cl. 8 of the charterparty provides as follows :

... charterers to bear the franchise according to the club rules, which owners would have otherwise borne.

A Under the club rules, there is a provision in r. 2 (m) to this effect—a proviso attached to all the different subrules of protection and indemnity risks which are covered by the club :

Provided that, except in respect of claims for loss of life and personal injury, the member shall bear the first £10 of any one claim attaching to either the protection or indemnity section of the rules, unless other standards are provided therein.

B In one or two cases, it is a higher standard than £10. That means that, when the owner makes a claim on the club for payment of a liability to a bill of lading holder, the club will automatically say to the owner : “ Yes, we will pay the claim less £10.” That deduction is spoken of in the charterparty as “ the franchise according to the club rules.” It
C was contended by the charterers here that, by reason of their interpretation of the earlier part of cl. 8, they had a complete answer to the owner’s claim for indemnity under the ordinary principle that an owner is entitled to indemnity from his charterer if the charterer puts upon him a liability which otherwise he would not have incurred. They said : “ At any rate,
D the benefit to which you are entitled from the club is the whole amount less £10. We contend that we are not liable to you for anything, but, alternatively, we submit that we are only liable to you for the £10 which you could not get out of your club.” That is the relevance to these proceedings of that particular provision about the £10 franchise.

E Before I deal with the arguments addressed to the court below and to this court, I will just refer to the remainder of the award, so far as it is necessary to do so. The award was expressed in alternative forms :

The question for the decision of the court is whether on the facts found and the true construction of the contract the claimants are entitled to recover £101 3s. 4d. or £10 or nothing.

F The finding of fact in the award was that the damage to the goods which gave rise to the claim was caused by improper stowage by the time charterers, making the right of indemnity of the owners attach as against the charterers. On the award being submitted in those alternative forms
G to LEWIS, J., before whom the special case was brought, LEWIS, J., held that, on the true interpretation of cl. 8, the benefit which the owners undertook to give was the whole benefit which they might get from the club, and that, in this case, as the club had paid the bill of lading claimant direct, there was no way of giving effect to that undertaking in cl. 8
H except by saying that, the owners having got complete “ benefit ” from the insurance with the club, the only way of giving effect to the undertaking of the owners in the charterparty was to say equally that the time charterers should have the same degree of benefit, and be relieved from all liability, subject to the £10 franchise. LEWIS, J., said :

I feel I ought not to say that the clause is to be of limited application.

He held, first, that the only effect of r. 17 is that a person to whom the member assigns his cover is not to be able to bind the association. That is to say, to such a person the association could say: "We do not recognise this, and we are not going to pay." Then he goes on:

I do not see why in a case like the present, where the time charterer is not attempting to get money out of the club, he is not entitled to say: "There is nothing in the club rules which disallows you from giving me the benefit of what you have got from your club, or what you may get from your club." A

Consequently, he took the view that, to the extent of what the owner got from the club, the charterer was entitled to say he was equally entitled to it by reason of the clause in the charterparty by which the owner gave him the benefit of his club protection. B

The question we have to decide is whether the judgment in favour of the time charterers (except for the £10 franchise) is right or wrong. In my view, that decision is wrong, for the reasons I have already stated. The question is a pure question of interpretation, and, in my view, the association of the provision in the second half of cl. 8 with the first half of that clause makes the position still clearer. The first half of that clause provides that the captain shall sign bills of lading as presented. The very next words are that the owners are to give the time charterers the benefit of their club insurances in case of shortage or damage to cargo. That shows that the provision is directly addressed to the case of the liability of the owner by reason of the act of the charterer, and it also makes it clear that the liability against which the time charterers desire the benefit of the club protection is their liability to the owner under their implied obligation to indemnify him against the liability which they have put upon him. For that reason, the argument that the time charterers' liability contemplated by cl. 8 must be a liability to persons other than the owners, to my mind is necessarily a wrong interpretation. That was the first argument addressed to us by counsel for the owners, but, for the reasons I have given, I think that that argument is wrong. The clause is, as it is framed, quite appropriately adapted to dealing with the time charterers' liability to the owners under the ordinary implied indemnity, and, in my view, it is not necessary to consider what other meanings the clause may have, or what other applications may be given to it, or what other circumstances may give rise to its application. It is enough to say that the particular facts of this case are, in quite clear language, covered by cl. 8, and that, for the reasons I have mentioned, the club rules are such as not to allow any benefit of the club insurance being given to the time charterers. C D E F G

That being so, what is the final result? The provision about giving the benefit to the time charterers has no application to the facts of this case at all. *Ex hypothesi*, for the reasons I have mentioned, the club requires the member to preserve for its benefit his right of recourse. In other words, it is a condition of their contract of insurance with him that that should be done. Therefore, the time charterers are prevented from H

invoking any part of the club rules, because their right to do so is excluded by the terms of this clause of the charter. Therefore, in my view it follows that the £10 provision is just as irrelevant as the major provision under which the club gives the owner the benefit of the insurance against the third-party claims by bill of lading holders. Accordingly, the judgment, in my view, should be against the time charterers for the whole amount of £101 3s. 4d., which is the full claim for indemnity under the terms of the charterparty, if the clause about the benefit of club insurance is eliminated, and, for the reasons I have given, that clause, in my opinion, has no application here, because the club rules do not allow it to be applied, and, therefore, it is wholly eliminated from the consideration of the case.

There is only one other minor matter upon which I desire to add one word, and that is this. It was contended that the clause which says that "Charterers are to load, stow, and trim the cargo at their expense under the supervision of the captain" was a clause which left the obligation of stowage, as between ship and charterer, solely with the ship, and that the words "under the supervision of the captain" imported that he had to give directions as to the whole of the stowing, and that, consequently, the charterers had no obligation in regard to it, and that, therefore, their primary liability to indemnify the owners never arose. That argument was submitted to the court on behalf of the charterers, but, in my opinion, it is an erroneous argument. That matter has been, as a matter of fact, considered in the courts; particularly in *Brys & Gylsen, Ltd. v. J. & J. Drysdale & Co.* (1), a case tried before GREER, J., as he then was. There was a clause in the charterparty in that case which provided that the charterers or their agents were to provide and pay a stevedore to do the stowing of the cargo under the supervision of the master. When that case came before the court, GREER, J., said, at p. 25:

I think the effect of such a clause is to transfer the duty and obligation, which would otherwise rest on the shipowner, to the charterer, of stowing the cargo in the way it ought to be stowed. . . . To my mind, the effect of this clause is the same as LORD ESHER felt would be the effect of the words "employ and pay the stevedore" in his judgment in *Harris v. Best, Ryley & Co.* (2).

In *Harris's* case (2) at p. 76, there was a clause in the charterparty which provided as follows:

Stevedore to be appointed by the charterers in London only, but employed and paid for by owners. . .

In that case, LORD ESHER, M.R., said *obiter*, at p. 77:

Sometimes it is stipulated that the charterer is to employ and pay a stevedore, and if he is to employ a stevedore to stow the cargo, then he is liable for the consequences of bad stowage.

Then he pointed out that the mere fact of his employing and paying the stevedore made the stevedore his servant, or, at any rate, made him responsible for the good stowage of the cargo. Those two cases, although perhaps not absolutely in point, or perhaps not absolutely binding on

this court, I think establish a true interpretation of a phrase in a charterparty, such as the words here in cl. 8 :

... charterers are to load, stow, and trim the cargo at their expense under the supervision of the captain. . . .

Further, I think that that is the true interpretation of the clause. For those reasons, I think that in this case the judge took a wrong view of the interpretation of cl. 8 and the club rules. I notice that in his judgment he does not cite the second half of r. 2 (i). It is possible that that second half of the rule was not brought to his attention, as it was to our attention on the argument before us. I think that that particular half of the rule is one of vital importance here, because it is the combination of that rule with r. 17 which makes the interpretation which I have put upon the charterparty, in my opinion, clear—and it may be that that is the reason why the judge took the view he did as to the interpretation of this charterparty. For these reasons, I think that this appeal must be allowed and judgment entered for the owner against the charterer under the award for £101 3s. 4d., with costs here and below.

CLAUSON, L.J. : Logically, the first question in this case is whether, on the true construction of the charterparty, the liability for improper stowage is thrown, as between the time charterers and the owners, on the time charterers. The provisions of cl. 8 of the charterparty shift this liability from the shipowners to the charterers, unless the words “under the supervision of the captain” have the operation of replacing the liability, as between those parties, on the shipowners. The words as to “supervision” do not appear to me so to operate. They merely, at the most, entitle the master to interfere with the stowage for the limited purpose of protecting the ship from something which would interfere with its seaworthiness. They have, in my opinion, no operation as regards shifting the onus, save possibly where the master’s interference has been the cause of the improper stowage. That, of course, is not the present case. The same view appears to have been taken by GREER, J., in *Brys & Gylsen, Ltd. v. J. & J. Drysdale & Co.* (1).

The liability for improper stowage being thus, as between the time charterer and the shipowner, upon the time charterer, and the shipowner having in fact paid, or procured his club to pay for him, the £101 admittedly payable to the cargo owner in respect of the improper stowage, it follows that the shipowner has the right to recover the £101 against the time charterer unless there is some provision in the charterparty which modifies this position. It is suggested that the position is modified by the last sentence in cl. 8 of the charterparty. It is suggested that the charterparty provides that, to the extent to which the shipowner is in a position to obtain indemnity against this liability from his club, he must transfer to the time charterer the benefit of his cover, with the result that the time charterer will get protection at the expense of the shipowner’s club.

In the present case, under the rules of the club, the shipowner has to bear the first £10 as between himself and the club, and the result is, if this view be correct, that the time charterer gets protection to the extent of £91 at the expense of the club, and must indemnify the shipowner to the extent of £10 only. Whether this contention would succeed if cl. 8 of the charterparty stood as in print is a question which does not arise, and about which, for myself, I do not propose to express any opinion. I am, however, of opinion that that contention is excluded by reason of the presence in the charterparty of the words "as far as club rules allow." Turning to the club rules, and particularly to the part of r. 2 (i) which must, of course, be read in conjunction with all the other rules, including r. 17, it appears to me to result as a matter of construction that it is a condition of the indemnity to which the member is to be entitled under the rules that the club is to have the right to recover for its own account any sum which the member may be entitled to recover from any third party in respect of the matter of his claim against the club. The words in the charterparty "as far as club rules allow" have the result, in my view, that no greater right in respect of the cover is to be vested by reason of this clause in the time charterer than such right as could be so vested consistently with the provision of the club rules. So reading the clause, it seems to me to follow that the time charterer cannot claim against the shipowner under this clause, in view of the rules of the club, to be freed from the very liability which it is a condition of the indemnity that the club shall be entitled to enforce against him for its own account. The consequence is that, for the purposes of the present matter, and in the case of a shipowner who is a member of this particular club, with these particular rules, the last sentence of cl. 8 has no effective operation for the benefit of the time charterer. Accordingly, in my judgment, the appeal should be allowed, and the judgment should be to the effect that the claimants are entitled to recover £101 3s. 4d., with the result as to costs which is stated in para. 14 of the award, and the respondents, the time charterers, must be ordered to pay the costs of the appeal.

GODDARD, L.J. : On the first point—namely, whether the liability for the improper stowage falls on the owners or the time charterers—I entirely agree with the view taken by the judge and by SCOTT and CLAUSON, L.JJ., and I propose to say no more upon that. On the second point, I have the misfortune to differ from SCOTT and CLAUSON, L.JJ. Naturally, I express my opinion with some hesitation, although perhaps with less hesitation than I should otherwise do because I am agreeing with the judge below and with the view taken by an arbitrator whose very wide experience in these matters is well known.

The point arises in this way. The owners, having had to pay the bill of lading holders for damage caused by reason of improper stowage, the liability for which, as between themselves and the time charterers, falls

on the latter, claimed in the arbitration to be repaid that sum. They are met with this answer: "You, the owners, have agreed to give us, the time charterers, the benefit of the protection and indemnity club insurance so far as your club rules allow." The only question which I see which arises on this part of the case is whether the club rules—the club being the West of England Steamship Owners' Protection and Indemnity Association—permit of that bargain being made between the owners and the time charterers. If they do not, the claim fails. However, as between the time charterers and the owners, if I can place a construction upon the rules which does enable protection to be given, as against a construction that prevents the protection from being given, I think that I ought to prefer the construction which allows the protection to be given, because *this* clause is put in the charterparty for the benefit of the time charterers. This is where I differ from SCOTT and CLAUSON, L.JJ. I do not find anything in the rules which prevents the owners from making this bargain with the time charterers. The way the case arises is this. When the owners claim against the time charterers, they say: "True, we are liable to you, but you have been paid your loss by your club, and, as you have contracted to give us the benefit of that payment, there is nothing you can recover from us." It would be, in my judgment, exactly the same if they had not actually been paid by the club, but had a right to be paid by the club, because then the answer would be: "You go to your club, and get the money from your club, and you have to give us the benefit of that money, so there is nothing which can be claimed from us, because you will hold the money as trustee for us"

Both before the arbitrator and before the judge, it does not appear that the question as to r. 2 (i) which has been so much discussed before us was so much as mooted. The only point which seems to have been taken there is with regard to r. 17. It is quite clear that this point was not taken before the arbitrator, because he has set out his special case with extreme care, but he has not set out the words in r. 2 (i) upon which so much depends. That clearly shows that nobody thought of raising that point before him. Nor was the point apparently discussed before LEWIS, J., because he does not mention it at all, counsel for the appellants at the arbitration having based his argument solely upon r. 17. For myself, I confess that, when a case has been before an arbitrator of the experience of Mr. Willink and a judge of the experience of LEWIS, J., and has been argued by experienced counsel, I think that I should look very carefully at an argument which does not emerge until the case comes into this court.

As I understand it, the way it is put is this. Rule 2 (i) of the club rules is in these words, omitting immaterial words:

... the association shall be entitled to ... recover for its own account from third parties any damages that may be provable by reason of such neglect.

For myself, I do not regard that as any more than a statement of the

common law—namely, that, if the association, being the insurers in the case, pay the assured, they are entitled to subrogation of his rights—but, before the right of subrogation can arise, there must be a claim which can be made by the assured against some third person. If there is no third person against whom the claim would lie at the suit of the

- A** assured, no right of subrogation arises. If I insure my property against all risks and I myself damage that property through my own negligence, I am entitled to recover from my insurers. For instance, if I have insured a motor car against damage and I run it into a wall, I am entitled to recover in respect of that damage from my insurers. No
- B** question of subrogation arises there. I regard *these* words as though they were written into a policy of insurance, and I then ask myself whether, if they were, there is anything in those words which prohibits the assured from making any contract which he sees fit to make. I confess that there is not, unless I read into the clause a great many
- C** words which are not there. Ordinarily, the assured may make such a contract as he likes, provided that it is not forbidden by the policy. Take the instance of a motor car insurance again. If I insure my motor car against damage and it is damaged by the negligent act of a third party, the insurer pays me, but he has his right of subrogation. Take
- D** the common case which can arise, and does arise, every day. Everybody knows now, and it has been affirmed by this court, that garage proprietors say that they will not take in cars except at owner's risk, which absolves them from liability for negligence. If my car is damaged while in the garage by the garage proprietor's negligence, I cannot
- E** recover against the garage proprietor. However, though I have words in my policy preserving or setting out the insurer's right of subrogation, it would be startling to hear that the insurer could refuse to pay me for the damage to my car because the garage people had only taken the car in on the terms that they should not be liable for damage caused
- F** to it by their negligence. I do not regard the words of this rule as in any way limiting the right of the assured to make what contract he pleases. I do not think the words "the association shall be entitled to . . . recover for its own account from third parties any damages that may be provable by reason of such neglect" ought to be construed as
- G** meaning: "You are never to make a contract which will deprive you of the right to recover damages against the third person," because it is only if I have the right to recover against the third person that the insurance company can have the right to recover against that third person.

- H** The cases which counsel for the appellants cited and relied on as saying that, if the assured did anything to deprive the insurer of his right of subrogation, he then became liable in damages to the insurance company, the measure of which was the amount which had been paid to him by the insurance company, were all cases in which the assured altered the position between himself and the third party, who would

otherwise have been liable, after payment by the insurance company and after the right of subrogation had become vested in the insurance company. That, of course, is an entirely different thing. If I have been paid by my insurance company for damage to my car, and have the money in my pocket, I must not then go and release the person who has caused the damage, so as to deprive my insurer, who has paid me, of the right of pursuing the wrongdoer. I think that it is difficult—and, indeed, I find it impossible—to read into r. 2 (i) a prohibition upon the assured from making a contract of this sort in the ordinary course of his business, although it may have the effect of excluding recovery from a wrongdoer so that the insurance company would have no remedy against him. If the intention of the club is to do any such thing, I think it should be stated in clear terms. As I have said, the interpretation I put upon *this* rule is no more than that it is declaratory of the right of the insurance company to pursue its ordinary right of subrogation if there is a claim which can be enforced in those circumstances.

With regard to r. 17, which was the only rule which was relied upon before the arbitrator, and, so far as I can see, before LEWIS, J.—certainly it was the only rule relied upon before the arbitrator—I would say that that, in my judgment, has nothing to do with the case. That rule provides as follows :

No assignment or subrogation by a member of his cover with this association to charterers or any other person shall be deemed to bind this association to any extent whatsoever.

That, to my mind, simply means this : “ You shall not assign your contract of insurance.” A marine insurance policy is by sect. 50 of the Marine Insurance Act assignable unless it contains terms expressly prohibiting assignment. I read that rule as meaning only that the contract of insurance between the club and its member shall not be assigned by the member to any other person. In other words, no other person is to be thrust upon the club as one of its members or assured without its consent. For these reasons, I would be for dismissing the appeal and upholding the award as directed by LEWIS, J.

Appeal allowed with costs in both courts. Leave to appeal to the House of Lords.

Solicitors : *Holman, Fenwick & Willan* (for the appellants) ; *Middleton, Lewis & Clarke* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

**Re WILLS, DULVERTON AND ANOTHER v. MACLEOD
AND OTHERS.**

[CHANCERY DIVISION (Simonds, J.), **April 25, 26, May 10, 1939.**]

Wills—Hotchpot clause—Advances—Ascertainment of interest of beneficiaries—Charge of interest on advance as from death of testator.

- A** The testator by his will directed his trustees to hold his residuary estate upon trusts, as to two equal fifth parts to pay the income thereof to his wife during her life and after her death upon the trusts declared therein concerning the remaining three fifth parts—namely, upon trust for all his children in equal shares (except that each son should take three times as much as each daughter) until attaining 25 years of age, or, in the case of his daughters, their marriage, the daughters' shares not to vest in them absolutely, but upon the trusts therein stated. By
- B** cl. 19 of his will, the testator further declared that all sums of money, investments or property which, prior to his death, he had given or settled for the benefit of any of his children above the sum of £500 at any one time should be taken in or towards satisfaction of the share in his residuary estate of such child and be brought into hotchpot and accounted for accordingly. Prior to his death, the testator had made
- C** settlements of varying amounts on each of his 5 children. The trustees desired the direction of the court as to the charge of interest upon the advances made to the beneficiaries :—
- D** **HELD:** the advances made to the beneficiaries should be charged with interest at 4 per cent. as from the death of the testator, the amount of such advances being determined by the value of the settled securities as at the date of settlement.

[EDITORIAL NOTE. The importance of this decision lies in the fact that for many years the rule upon the matter was definite; but in *Re Hargreaves* (3) that rule appeared to be departed from. The departure has often been explained as being the result of the particular circumstances in that case, and the old rule seems at once to

E have been reverted to until the decision in *Re Mansel* (9). The present decision reverts to the old rule. In matters of administration of estates, it is impossible that a perfect rule which will do perfect justice in all cases can be found or established, and the essential thing is that there shall be a definite rule applicable to all cases, so that parties may know the rule to be applied.

F AS TO HOTCHPOT, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 842-845, paras. 1500-1502; and FOR CASES, see DIGEST, Vol. 44, pp. 1247-1250, Nos. 10761-10776.]

Cases referred to :

- (1) *Andrewes v. George* (1830), 3 Sim. 393; 44 Digest 1245, 10751.
- (2) *Re Rees, Rees v. George* (1881), 17 Ch.D. 701; 44 Digest 1245, 10752; 50 L.J.Ch. 328; 44 L.T. 241.
- G** (3) *Re Hargreaves, Hargreaves v. Hargreaves* (1903), 88 L.T. 100; 44 Digest 1248, 10767; varying 86 L.T. 43.
- (4) *Re Forster-Brown, Barry v. Forster-Brown*, [1914] 2 Ch. 584; 44 Digest 1249, 10771; 84 L.J.Ch. 361; 112 L.T. 681.
- (5) *Re Tod, Bradshaw v. Turner*, [1916] 1 Ch. 567; 44 Digest 1247, 10766; 85 L.J.Ch. 668; 114 L.T. 839.
- (6) *Re Poyser, Landon v. Poyser*, [1908] 1 Ch. 828; 44 Digest 1248, 10768; 77 L.J.Ch. 482; 99 L.T. 50.
- H** (7) *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358; 44 Digest 1248, 10770; 83 L.J.Ch. 403; 109 L.T. 846.
- (8) *Re Cooke, Randall v. Cooke*, [1916] 1 Ch. 480; 44 Digest 1249, 10772; 85 L.J.Ch. 452; 114 L.T. 555.
- (9) *Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352; Digest Supp.; 99 L.J.Ch. 128; 142 L.T. 281.

(10) *Re Hart, Hart v. Arnold* (1912), 107 L.T. 757; 44 Digest 1248, 10769.

(11) *Re Willoughby, Willoughby v. Decies*, [1911] 2 Ch. 581; 44 Digest 1245, 10750; 80 L.J.Ch. 562; 104 L.T. 907.

(12) *Re Gilbert, Gilbert v. Gilbert*, [1908] W.N. 63; 44 Digest 1247, 10764.

ADJOURNED SUMMONS for the determination of questions arising on the will, dated June 2, 1918, of Frederick Noel Hamilton Wills. The facts are fully set out in the judgment.

H. B. Vaisey, K.C., and *C. V. Rawlence* for the trustees.

G. P. Slade, K.C., and *Lindsay M. Jopling* for the first defendant.

C. Montgomery White for the second and third defendants.

A. Andrewes Uthwatt for the fourth defendant.

Vaisey, K.C., referred to *Re Mansel, Smith v. Mansel* (9).

Jopling: The case of *Re Tod, Bradshaw v. Turner* (5) was similar to, and should govern, the present case. [Counsel referred to *Re Mansel, Smith v. Mansel* (9), *Re Hargreaves, Hargreaves v. Hargreaves* (3), *Re Poyser, Landon v. Poyser* (6), *Re Tod, Bradshaw v. Turner* (5), *Re Willoughby, Willoughby v. Decies* (11) and *Re Forster-Brown, Barry v. Forster-Brown* (4).]

Montgomery White: The case of *Re Hargreaves, Hargreaves v. Hargreaves* (3) is binding here unless the present case can be distinguished from it. The valuation must be made at the death of the testator. *Re Hargreaves, Hargreaves v. Hargreaves* (3) has been followed in *Re Gilbert, Gilbert v. Gilbert* (12) and *Re Hart, Hart v. Arnold* (10). The present case is distinguishable from *Re Rees, Rees v. George* (2), as in that case there was no immediate distribution. On the facts alone, *Re Poyser, Landon v. Poyser* (6) is quite easily distinguishable from this case, and in *Re Cooke, Randall v. Cooke* (8) the estate could not be valued at the date of the death, and *Re Hargreaves, Hargreaves v. Hargreaves* (3) could not be applied. *Re Craven, Watson v. Craven* (7) explains and distinguishes *Re Hargreaves, Hargreaves v. Hargreaves* (3). A considerable part of the testator's estate here consisted of shares in a private company. The period of distribution was, in *Re Forster-Brown, Barry v. Forster-Brown* (4), the date of the death of the widow, and not that of the death of the testator. FARWELL, J., sums up all the authorities in *Re Mansel, Smith v. Mansel* (9).

Jopling: The case of *Re Hargreaves, Hargreaves v. Hargreaves* (3) was founded upon a very special will, and ROMER, L.J., was dealing with it according to the particular wording of that will. [Counsel referred to JARMAN ON WILLS, 7th Edn., Vol. II, p. 1146.]

SIMONDS, J.: The testator, Frederick Noel Hamilton Wills, made his will on June 2, 1918, and thereby, so far as material for the purpose of the present case, directed his trustees to stand possessed of his residuary estate upon trust as to two equal fifth parts thereof to pay the income thereof to his wife during her life and after her death to hold the capital and future income thereof upon the trusts thereafter declared

concerning the remaining three fifth parts thereof—that is to say, upon trust for all his children who, being male, should attain the age of 25 years, or, being female, should attain that age or marry under it, and, if more than one, in equal shares, except that each son should take three times as much as each daughter. The testator then directed that his daughters' shares should not vest in them absolutely, but should be held upon the usual trusts for the benefit of them and their children, which I need not state in greater detail. Then, after certain provisions as to maintenance and accumulation, by cl. 19 the testator declared as follows :

I declare that all sums of money investments or property which prior to my death I may have given or settled or covenanted to give or settle to or for the benefit of any child of mine or his or her wife or husband or issue either on his or her marriage or otherwise over and above the sum of £500 at any one time shall in default of any direction to the contrary in writing under my hand be taken in or towards satisfaction of the share of the said child in my residuary estate and shall be brought into hotchpot and accounted for accordingly.

The testator died on Oct. 11, 1927, leaving his widow him surviving and 5 children whom I will call shortly Rosemary, Michael, Hugh, Margery and Audrey. Rosemary was born on Mar. 15, 1913, Michael on Oct. 4, 1915, and Hugh on June 19, 1917. Margery and Audrey are still infants and unmarried. Therefore Rosemary alone has acquired an indefeasible interest in the residuary estate.

Before his death, the testator had made settlements of varying amounts on each of his children. He died possessed of a very large fortune, and the presumptive share of each of his children in the three-fifths of his residuary estate in which his widow had no life interest largely exceeds the settled sums which have to be brought into account against that share under the provisions of cl. 19. His estate not specifically devised and bequeathed consisted, except to a trivial extent, of securities quoted on the principal stock exchanges. In these circumstances, the trustees seek the directions of the court upon a question which is thus stated in para. 4 of the originating summons :

That it may be determined whether for the purpose of the division of the income and accumulations of income of the three-fifths of the testators' residuary estate in which his widow the defendant Margaret Hamilton Wills takes no life interest pending the appropriation thereof : (a) interest at the rate of 4 per cent. per annum less tax on the capital sums to be brought into hotchpot against each child or in the alternative the actual income received from such capital sum ought to be added for computation to the actual income of three-fifths of the estate for the period and the aggregate amount of income so arrived at ought to be divided into equal shares (except that the share of each son shall be three times as much as the share of each daughter) and credited to the respective children subject in each case to the deduction of interest at the rate aforesaid on the sum to be brought into hotchpot or (b) the sums to be brought into hotchpot ought to be added for computation to three-fifths of the capital of the residuary estate and the sum to be brought into hotchpot by each child deducted from such child's share (each son's share being three times as great as each daughter's share) in the aggregate amount of the capital so arrived at and the income and accumulations of income of the residuary estate allocated to the children in proportion to their respective shares of capital so arrived at.

The second alternative under (a) is a method which has never been adopted by the court in such a case, and I do not propose to introduce

it for the first time. The choice lies between the first alternatives under (a) and (b), and it is not an easy one, in the present state of authority.

At the outset of my judgment, I wish to emphasise the nature of the matter with which I am dealing. It is a rule of administration resting, not on the particular directions of a testator, but upon general principles, that this court administering the estate of a deceased man endeavours to deal fairly between his beneficiaries. That principle requires that, where an advanced beneficiary has to bring the capital amount of his advance into hotchpot against his share of the capital of the estate, some means must be devised of equalising the position in regard also to the income of the estate, for it would be manifestly unfair that the advanced beneficiary should at once enjoy the interest of the sum advanced and be placed in the same position as unadvanced beneficiaries in regard to the income earned by the capital of the estate before distribution. The court might have adopted one of many methods of meeting this difficulty. Three methods are indicated in the questions of the summons which I have read. Any one method might, in a particular case, appear to be the fairest, and, in another case, another. However, in this, as in other matters of administration, it has long been realised that the essential thing is to have a settled rule. It may work less well in some cases than it does in others, but that is probably true of every rule of equity or of law, and is a consideration of little weight against the importance of certainty and regularity. Nor is it less important, when once a rule has been established, not to refine upon it by exceptions and exceptions on exceptions, for thus there is created the very state of uncertainty and confusion which led in the first place to the establishment of the rule.

With these commonplace considerations in mind, I turn to the problem raised by this summons. It is one for the solution of which a settled rule was established very long ago. I do not think it necessary to look back more than a little over 100 years. In *Andrewes v. George* (1), the testator bequeathed his residue upon trust for his wife for life, and after her death for his 5 children in equal shares, and, after reciting that he had made advances to some of them, directed that his trustees before they distributed his estate should deduct from his sons' and daughters' shares [p. 394]:

... so much money as had been advanced and lent to him, her or them, by him, so as to render their shares quite equal and to the amount they would have been entitled to, had he not advanced the said sums of money, but that the whole had been remaining at his decease, and been attendant on the directions of his will.

He died on Sept. 27, 1819, and his widow survived him by a few months only. A decree for administration of his estate was duly made, and the master was directed to inquire and state the amount advanced by the testator in his lifetime to his several children and to compute interest on such advances at the rate of 4 per cent. per annum from the time of the testator's decease, but without prejudice to the question whether any

- and what interest should be charged thereon, and whether from the time of the testator's decease or from any later period. The master duly certified, and the cause then came on to be heard for further directions upon the question from what period the interest on the advances ought to be computed. SIR L. SHADWELL, V.-C., said that the testator meant
- A that the deductions in respect of the advances should be made at the time when his property would become divisible—namely, the death of his widow—and accordingly directed interest at 4 per cent. to be computed on the advances from that date. The significance of this case is that from first to last there is no suggestion of any other method of fairly
- B adjusting the rights of the beneficiaries except by charging interest upon advances, the only question upon which it may be observed that the reporter makes an interesting note, being the date from which interest is to run. It is clear, I think, that the rule, artificial and arbitrary though it might be, was already established as the fair way of dealing
- C with the matter. From that time onwards, there must, I suppose, have been countless administrations in which advanced sums had to be brought into hotchpot, whether by virtue of a testator's directions or by the application of the rule against double portions, and it is fair to assume, since no hint to the contrary is to be found in any case, that the rule as
- D I have stated it was adhered to both by the court in administering estates and in administrations out of court. I refer to only one case, *Re Rees, Rees v. George* (2). In that case, SIR GEORGE JESSEL, M.R., had to consider only the date as from which interest must be charged on sums brought into hotchpot, but it is, I think, impossible to read his judgment
- E without feeling a conviction that he had never contemplated any way of adjusting the rights of advanced and unadvanced beneficiaries in regard to income other than that of charging interest against advances.

- It was in this state of the law that *Re Hargreaves, Hargreaves v. Hargreaves* (3) came before JOYCE, J., and the Court of Appeal. It is
- F to be observed that in that case the questions raised by the summons were whether, under the provisions contained in the will and the codicils of the testator, the advanced children were liable to pay interest on the advances made to them by their father in his lifetime, and, if so, whether such interest should be at a rate varying according to the actual income
- G derived from the residuary estate, or at a fixed, and, if so, what fixed, rate, and, secondly, from what date such interest should run. Not yet is there a hint of any other method than that of charging interest for adjusting the rights of beneficiaries. In the judgment of JOYCE, J., there is indeed a single passage which somewhat uncertainly suggests
- H an alternative method, but the judgment as a whole is decisive in favour of the established practice of charging interest at 4 per cent. on advances which had to be brought into account. The date from which interest should run, in view of the fact that a large annuity was payable out of residue, and the rate at which it should be charged, were the substantial questions argued. Against his decision, the advanced children appealed.

It does not appear from the report what their argument was, but it would seem that neither party argued for that which the court decided : see per SARGANT, J., in *Re Forster-Brown, Barry v. Forster-Brown* (4), at p. 591. In effect, that decision was that, for the purpose of ascertaining the proportions of the settled shares of the testator's children, the value of his net residuary estate at the date of his death ought to be ascertained, and that there should be added thereto the amount of the several advances made to his children, and that the actual income received as from the testator's death ought to be divided in the respective portions so ascertained, and that any calculation of interest was accordingly unnecessary. Here, then, for the first time, was a decision which imported a new method of adjusting the rights to income of advanced and unadvanced beneficiaries. Was it, then, a decision which turned solely upon the provisions of the will which the court had to consider and apply solely to the estate thereby disposed of, or was it a decision of general application, substituting a new rule for one which had so long been established ? Upon this question I should have entertained little doubt, but for the authorities to which I must presently refer. It is, in my judgment, unlikely in the extreme that the court should have intended to substitute a new rule of general application, and it is interesting that both in the judgment of ROMER, L.J., and in that of COZENS-HARDY, L.J., the opening reference is to the express provision in the testator's will whereby he directed the ascertainment of a child's share as at his death with a valuation as at that date of any stocks, funds or securities which were to be brought into account. A general rule of administration must, of course, give way to clear directions in a testator's will, or to any directions which cannot be carried out consistently with its application. So I read the decision in *Re Hargreaves, Hargreaves v. Hargreaves* (3). It is, I think, a decision resting solely on the particular language of the testator's will, and, though there are some observations towards the end of the judgment of ROMER, L.J., which are of a most general character, they were not necessary to his decision, and cannot, in my judgment, be regarded as justifying a departure from the old rule in any case in which the peculiar features of *Re Hargreaves, Hargreaves v. Hargreaves* (3) are not present. In coming to this conclusion, I am supported by the authority of SARGANT, J., in *Re Forster-Brown, Barry v. Forster-Brown* (4), to which I have already referred, and again in *Re Tod, Bradshaw v. Turner* (5). In *Re Poyser, Landon v. Poyser* (6), and again in *Re Craven, Watson v. Craven* (7), WARRINGTON, J., did not adopt the method prescribed in *Re Hargreaves, Hargreaves v. Hargreaves* (3), but reverted to the ancient way. YOUNGER, J., took the same course in *Re Cooke, Randall v. Cooke* (8). It is true that in nearly all these cases there were points of difference from *Re Hargreaves, Hargreaves v. Hargreaves* (3), either in the language of the will or in the circumstances of the estate being administered. They are indicated by FARWELL, J., in his judgment in *Re Mansel, Smith v. Mansel* (9).

- Nevertheless, I cannot read the judgment of SARGANT, J., in *Re Tod, Bradshaw v. Turner* (5) as anything but an unequivocal decision that the rule, if it be a rule, laid down by *Re Hargreaves, Hargreaves v. Hargreaves* (3) ought to be applied only in cases in which the will, upon its true construction, so directs, and I am, I think, entitled to take the
- A same course, though I do so with the greatest hesitation in view of the decision of FARWELL, J., in *Re Mansel, Smith v. Mansel* (9). I have not overlooked the decision of EVE, J., in *Re Hart, Hart v. Arnold* (10), but as to that I would adopt what SARGANT, J., said in *Re Tod, Bradshaw v. Turner* (5). In *Re Mansel, Smith v. Mansel* (9), FARWELL, J., felt
- B himself bound to apply the rule in *Re Hargreaves, Hargreaves v. Hargreaves* (3) unless it should be excluded on some substantial ground, and indicated that later authorities showed that there were at least two grounds on which it might be excluded, the first a difficulty in arriving at a fair and proper valuation of the residuary estate, or of
- C a substantial part thereof, and the second the fact that the testator appeared not to contemplate an immediate division of the estate. I respectfully agree that these were grounds upon which the rule in *Re Hargreaves, Hargreaves v. Hargreaves* (3) has been excluded, and I have no doubt that there may be other grounds upon which other
- D judges would find it possible to distinguish that case and exclude its rule. Where then are the uniformity and certainty which are the *desiderata* in a rule of administration? What is the test of a "fair and proper valuation"? A heavy burden is placed on executors if they must determine whether or not this consideration is satisfied so
- E as to make the rule applicable. What, for the purpose of the rule, is a "substantial portion" of the residuary estate which is incapable of such a valuation? Assuming that the property is susceptible of a fair and proper valuation at the death, by reference, for instance, to the stock exchange quotations, is it relevant that it is of a speculative
- F character, and that its value may greatly appreciate or depreciate between the death and the date when any distribution or appropriation can be made? If, again, the rule may be excluded where an immediate division is not contemplated, is it excluded only where division is delayed by the interposition of a life interest, or is it excluded also
- G where the delay is due to difficulties in getting in the estate, which may be for a considerable period? Even if the decision is delayed for no longer than the executor's year, I see no reason why, if any delay is sufficient, this should not be sufficient to exclude the rule. It is the fact that some delay occurs, and that some income may be derived from the estate
- H for the benefit of the residuary legatees before distribution, which makes an adjustment necessary. What logic dictates a different rule for a long and for a short delay? And what is short and what is long? These and similar considerations, which vividly illustrate the necessity for a settled rule, and the confusion which arises from refinements upon it, lead me to the conclusion that, if I may, I must regard the

decision in *Re Hargreaves*, *Hargreaves v. Hargreaves* (3) as governing only cases in which a testator uses language of similar import to that used in the will there under consideration, and in other cases apply the ancient rule. In my judgment, it is permissible for me to take this course. As I have already said, it is only with the greatest reluctance that I take a different view from that expressed by FARWELL, J., in *Re Mansel*, *Smith v. Mansel* (9). I do not think that I should permit myself to do so were it not for the support that I get from the repeated expressions of SARGANT, J. The advanced beneficiaries will accordingly be charged with interest at 4 per cent. on their advances from the death of the testator, the amount of such advances being determined by the value of the settled securities as at the date of settlement.

Solicitors: *Williams & James* (for the trustees); *Trower, Still & Keeling* (for all other parties).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

KLEINWORT, SONS & CO. v. UNGARISCHE BAUMWOLLE INDUSTRIE ACTIENGESSELLSCHAFT AND HUNGARIAN GENERAL CREDITBANK.

[KING'S BENCH DIVISION (Branson, J.), April 26, 27, 28, May 8, 1939.]

Contract—Impossibility of performance—Foreign law—Exchange restrictions.

The plaintiffs, who are bankers in London, had up to 1931 granted credit facilities to the defendants (the Creditbank and a customer of that bank), the Creditbank sending bills drawn on the plaintiffs at 3 months by the customer of the Creditbank and indorsed by such customer of the Creditbank, accompanied by a letter from the customer undertaking to put the plaintiffs in funds and a guarantee by the Creditbank. In July, 1931, by legislation passed in Hungary, the National Bank of Hungary was placed in control of the dealings with foreign exchange by residents in Hungary. As a result, standstill agreements were made in respect of the debts here in issue and the obligations were renewed until July 15, 1937. The plaintiffs then refused to enter into a further standstill agreement, but bills of exchange and the accompanying letters were sent every 3 months, and upon those sent in April, 1938 this action was brought:—

HELD: (i) the law applicable to these bills and documents was English law.

(ii) an accompanying letter, which had been sent on each occasion since 1932, stating that the parties would only be in a position to provide cover if the exchange restrictions were withdrawn did not, upon its proper construction, nullify the express agreement to pay at maturity in the other documents, and the liability to pay could only be suspended by a renewal of the contracts.

(iii) the law of Hungary did not make it impossible for the customer to fulfil his contract to provide cover in London, since the contract could only be made unenforceable in England if there was a forbidden act required to be done in Hungary. As the contracts might have been fulfilled by applying to them funds lying to the credit of the defendants in London or elsewhere out of Hungary, the above conditions were not fulfilled, and the plaintiffs were entitled to succeed.

[EDITORIAL NOTE.] It is well known that most countries have placed restrictions upon dealings with foreign exchange, and this consideration of the position arising out of those restrictions is of obvious importance. There are two main questions, the first as to the law applicable to the standstill arrangements, and the other as to the applicability of the doctrine of impossibility of performance by the supervenient law of a foreign country. The latter is the more interesting, and it is held that a letter written from a foreign country ordering payments to be made in England is not a contravention of a law forbidding payments outside the jurisdiction of that country. The matter is, of course, dependent to some extent upon the proper construction and effect of the law passed by the foreign country.

AS TO IMPOSSIBILITY OF PERFORMANCE BY FOREIGN LAW, see HALSBURY, Hailsham Edn., Vol. 7, pp. 218, 219, para. 297; and FOR CASES, see DIGEST, Vol. 12, p. 374, No. 3102 *et seq.*

Cases referred to :

- (1) *De Beeche v. South American Stores, Ltd., and Chilean Stores, Ltd.*, [1935] A.C. 148; Digest Supp.; 104 L.J.K.B. 101; 152 L.T. 309.
- (2) *Ralli Brothers v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287; 11 Digest 397, 699; 89 L.J.K.B. 999; 123 L.T. 375.
- (3) *Ford v. Cotesworth* (1870), L.R. 5 Q.B. 544; 12 Digest 388, 3182; 39 L.J.Q.B. 188; 23 L.T. 165.
- (4) *Cunningham v. Dunn* (1878), 3 C.P.D. 443; 12 Digest 388, 3183; 48 L.J.Q.B. 62; 38 L.T. 631.
- (5) *The Halley* (1868), L.R. 2 P.C. 193; 11 Digest 395, 686; 37 L.J. Adm. 33; 18 L.T. 879.
- (6) *Glynn v. United Steel Works Corp'n.* (1936), 289 N.Y. Supp. 1037.
- (7) *Central Hanover Bank & Trust Co. v. Siemens & Halski A.G.* (1936), 15 Fed. Supp. 927.

ACTION upon certain bills of exchange and accompanying letters of the first defendants, customers of the second defendants, and upon a guarantee by the second defendants. The facts and letters are fully set out in the judgment.

A. T. Miller, K.C., and *H. G. Robertson* for the plaintiffs.

Sir Patrick Hastings, K.C., *Valentine Holmes* and *David Hastings* for the defendants.

BRANSON, J. : The plaintiffs are bankers in London. The first defendants are a Hungarian cotton company in Budapest, who are clients of the second defendants, the Hungarian Creditbank.

Previously to 1931, Kleinwort's had granted credit facilities to the Creditbank to be used by means of bills drawn on Kleinwort's at 3 months by customers of the Creditbank and indorsed by such customers and by the Creditbank. The practice was for the Creditbank to forward the bills to Kleinwort's, accompanied by a letter from their customer undertaking to place Kleinwort's in funds before the maturity of the bills and a letter from themselves guaranteeing payment of the bills and interest and expenses. By July, 1931, the indebtedness of the Creditbank to Kleinwort's in respect of such credits amounted to £483,375 4s. 9d., an amount which has since been substantially reduced. In that month legislation was passed in Hungary the general effect of which was to place the National Bank of Hungary in control of dealings with foreign ex-

change by residents in Hungary. In consequence of this legislation, a succession of agreements, called standstill agreements, was made between the National Bank of Hungary, the debtor Hungarian banks and the non-Hungarian creditor banks providing for the renewal from time to time of the obligations of the debtor banks. The plaintiffs and the Creditbank were both parties to these agreements, and the Creditbank's obligations were renewed accordingly until July 15, 1937. In July, 1931, the form of the letters which the Creditbank sent every 3 months to the plaintiffs was slightly changed, and the changed form was used thereafter, with the addition, after Mar., 1932, of another letter. A

In July, 1937, the plaintiffs declined to become parties to the new standstill agreement, which provided for renewal of the debtor banks' obligations for 3 years, but the letters continued to be sent every 3 months, with fresh bills of exchange, until those were sent upon which this action is brought. Some question was raised as to the form of the pleadings on both sides, but it was agreed that the plaintiffs are claiming upon the contracts contained in the Creditbank's letter to them of Apr. 4, 1938, enclosing 2 bills of exchange, the cotton company's confirmation of its liability to the plaintiffs, dated Mar. 19, 1938, and the Creditbank's guarantee, dated Apr. 4, 1938. They contend that the law applicable to those contracts is the law of England, and that, upon the true construction of those documents, the cotton company are liable for breach of their contract, contained in their letter of Mar. 19, to provide cover for the bills for £7,000 in pounds sterling in London at latest one day before their maturity, and the Creditbank are also liable under their guarantee that the cotton company would do so. B
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The defendants contend (i) that the law applicable is that of Hungary, (ii) that the additional letter which the Creditbank has sent on the occasion of each renewal since Mar., 1932, should be read as part of the contractual documents, and that, if so read, it prevents the debt maturing for so long as the law of Hungary forbids the defendants from providing pounds sterling in London to discharge it, and (iii) that the law of Hungary makes it impossible for the first defendants to fulfil their contract to provide cover in sterling in London, and that, so long as it continues to do so, the first defendants are relieved, under English law, from their obligation under that contract. F

I shall deal with each of these contentions in order. First, as to the law applicable. In each case, the contract is written in English, and consists of an offer made by letter from Hungary to London, accepted by the acceptance in London of bills payable in London. It obliges the defendants concerned to provide pounds sterling in London. London is, therefore, both the *locus contractus* and the *locus solutionis*, and I can see no principle upon which it should be held that Hungarian law should be applied to it. The only suggestion to the contrary was based by counsel for the defendants on a consideration of the law applicable to bills of exchange. The answer to this suggestion lies in the fact G
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that the contracts here sued upon are not contained in the bills of exchange, though made with reference to them.

A The next question is as to the construction of the documents, including the question whether the letter of Apr. 4, 1938, sent under separate cover, and not with the other documents, is to be read as part of the contract. The first letter, dated Apr. 4, 1938, from the Creditbank to the plaintiffs encloses the bills of exchange for £7,000 at 3 months' sight, which the Creditbank asks the plaintiffs to accept and discount : . . . applying the proceeds to retire previous acceptances for like amounts maturing on the 9th instant.

B The letter continues as follows :

Please find attached the drawers' confirmations of their liability, as well as our letter of guarantee made out in respect of the above bills, for your files. After having accepted and discounted the drafts in question, please confirm to us that you have released the drawers from their liability which they assumed towards you in connection with the bills maturing on the 9th instant. You will also oblige us by returning to us the letters of undertaking held by you in respect of the maturing drafts.

C The first of the attached documents, dated Mar. 19, is addressed by the cotton company to the plaintiffs, and reads as follows :

We understand from the Hungarian General Creditbank, Budapest, that you are agreeable to place at our disposal credit facilities up to the amount of £7,000 sterling. We have accordingly disposed on you as follows : £7,000 sterling at 3 months' sight, which please accept, and in consideration of your so doing, we hereby undertake to provide you with cover in pounds sterling in London for the above bills at latest one day before their maturity.

Then comes the letter from the Hungarian Creditbank to the plaintiffs, dated Apr. 4, 1938, which reads as follows :

E In consideration of your accepting in accordance with our request as per our to-day's separate letter drafts for £25,000 at 3 months' sight drawn on your good selves, we hereby guarantee to you that the necessary funds in sterling will be remitted to you in payment of the said bills at maturity.

F Those documents constitute an unequivocal contract on the part of the cotton company to provide in London at latest one day before the maturity of the bills of exchange cover in pounds sterling, and on the part of the Creditbank an unequivocal guarantee that :

. . . the necessary funds in sterling will be remitted [it does not say whence] to you in payment of the said bills at maturity.

G It was not suggested by the defendants that these documents did not impose upon the defendants the obligation to provide the sterling in London. Their case is that the second letter of Apr. 4 from the Creditbank to the plaintiffs postponed the time for the performance of it. The letter reads as follows :

H Pursuant to our to-day's separate letter containing our guarantee in respect of the drafts drawn on your good selves for the amount of £25,000 we beg to draw your kind attention to the fact that both drawers and we will only be in a position to provide cover at maturity if the exchange regulations prevailing in our country at that date will enable us to do so.

In my view, the proper effect to be given to that letter is to regard it as something separate from the contract of guarantee, and as an

intimation that the defendants will not be able to perform the obligations which it assumes to exist unless the Hungarian exchange regulations enable them to do so. To allow it to be read with the letters of Mar. 19 and Apr. 4 as part of the contracts would be to allow a letter deliberately kept separate from the others to contradict and nullify the express terms contained in those others. The first letter of Apr. 4 makes it plain that the exactly similar series of documents sent by the defendants to the plaintiffs on the occasion of the last renewal of the obligation of the defendants was regarded by the defendants as resulting in a present liability maturing on Apr. 9, 1938, and requiring a fresh series of contracts to procure its postponement for another 3 months. The same result appears from cl. 3 of the standstill agreement of 1936, under which the renewals of the defendants' liabilities were agreed to. That clause, so far as material, reads as follows :

All indebtedness arising under the facilities shall mature on the termination in any manner of this agreement and in particular the foreign bank creditors shall thereupon be entitled to debit the Hungarian debtors in their books as an actual liability with the amount of all bills accepted under acceptance credits for account of the Hungarian debtors or for account of third parties under the guarantee of the Hungarian debtors.

It is true that the plaintiffs did not debit the Hungarian debtors, as they might have, but continued to renew their obligations as before, but that makes no difference. There is no dispute that they had a right to debit them with an actual liability.

It is plain, therefore, that, apart from the third contention of the defendants, the plaintiffs are entitled to succeed. This contention requires for its foundation proof that performance of the contract would of necessity involve the doing by the defendants in Hungary of some act which would infringe the criminal law of that state. Evidence of Hungarian law was called by both parties. It is not necessary to examine in detail the various Hungarian enactments to which reference was made. According to the evidence of Dr. Nyari, those enactments make it penal for any Hungarian resident to make payment in foreign exchange anywhere to anybody unless with the permission of the Hungarian National Bank. The plaintiffs' evidence did not disagree with this in general terms, but suggested that there might have been left in the hands of the defendants foreign exchange which was free of restrictions by virtue of decree No. 4950 of 1931, ss. 4, 5. Under this decree, everyone permanently resident in Hungary had to declare any "foreign means of payment owned by them," whereupon one of two things might happen. Either the declaror might agree under sect. 5 of the decree to lend half of such means of payment to the Hungarian Treasury at 5 per cent., in which event the declaror might freely dispose of the other half, or, if the declaror did not take this course, the National Bank of Hungary might within 15 days call upon him to transfer the "means of payment" to them against an equivalent in pengoes. It was contended for the plaintiffs that in either of these

two ways the defendants, or one or other of them, might have sterling available with which to discharge their obligation to the plaintiffs in London. No evidence was given as to whether the defendants had lent half their "foreign means of payment," if any, or whether the National Bank had omitted to demand transfer of any foreign means of payment

A declared by the defendants or either of them. I was asked, however, to draw an inference that there was no such fund available from the fact that the defendants had applied to the National Bank for permission to discharge their liability to the plaintiffs and had been refused permission. It is a fair inference from the agreed statement that the

B defendants had applied for permission and been refused it, and that they had no fund from which, under Hungarian law, they could have discharged it lawfully without such permission.

Then it is said that, according to the principles of English law, our courts will not enforce an obligation upon a defendant the performance

C of which would of necessity involve him in doing something in a foreign country which would be an offence against the laws of that country. For this proposition, the passage in the opinion of VISCOUNT SANKEY, L.C., in *De Beeche v. South American Stores, Ltd., and Chilean Stores, Ltd.* (1) is sufficient authority. He said, at p. 156 :

D . . . it cannot be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do.

E It is true that his Lordship does not use the words "of necessity," but they are implied in the word "involves." The same principle was enunciated in slightly different language by SCRUTTON, L.J., in *Ralli Brothers v. Compañia Naviera Sota y Aznar* (2), at p. 304 :

F In view of the fact that the recent decisions of the House of Lords would require or enable the results of those decisions [*Ford v. Cotesworth* (3) and *Cunningham v. Dunn* (4)] to be justified in quite a different way, I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent states.

G Two elements, then, must co-exist if an English contract, lawful at its inception, is to be rendered unenforceable in the courts of this country by supervenient foreign legislation, (i) there must be an act which the contract requires to be performed in the foreign country, and (ii) that act must have been rendered unlawful there. The contract

H in the present case is not concerned with the doing of any act in Hungary. It calls for payment of pounds sterling in London, and nothing is said as to whence those pounds sterling are to come. They might even, so far as the contract is concerned, have already been lying to the credit of the defendants in London. The defendants contend, however, that, as Hungarian law has forbidden them to pay sterling

to anyone anywhere without the leave of the National Bank of Hungary, for which they have asked but which they cannot obtain, any act done by them in Hungary the object of which was to procure a payment of sterling in London would itself be unlawful. Thus it is said they cannot write an order, or telephone an order, or send a messenger out of Hungary with an order, to anyone outside Hungary to make such a payment. **A** They are, therefore, in the position that, though the contract does not expressly call upon them to do any act at all in Hungary, yet they cannot perform it without doing an act in Hungary which would be a breach of Hungarian law. This appears to me to be an ingenious attempt to extend the principle of law stated in *De Beeche's* case (1) **B** and *Ralli Brothers'* case (2) far beyond any set of facts to which it has hitherto been applied or is applicable. The acts which the defendants point to as being such as to bring them within the penal laws of Hungary are only forbidden if done in furtherance of an intention to make payments outside the jurisdiction of Hungary. The legislation in question **C** is not passed to control the actions within the jurisdiction of persons residing there, but to prevent such persons from paying debts owed by them outside the jurisdiction. That, and not the writing of a letter in Hungary, is what it is concerned to prevent. The Spanish legislature could forbid the payment of freight on jute at Barcelona at a rate **D** exceeding 875 pesetas a ton. The Chilian legislature could forbid residents in Chile from paying their rent of premises there in first-class bills on London, but no English court has yet held that an enactment forbidding persons within its jurisdiction from fulfilling an English contract to pay sterling in London can provide a defence to an action **E** in our courts upon that debt. In my opinion, the doctrine in question, based as it is upon the comity of nations, and limited as it was by SCRUTTON, L.J., in *Ralli Brothers'* case (2) by the words "in the absence of very special circumstances," cannot be applied to a case such as this, where one country has forbidden its residents to pay their lawful debts **F** due in another. This case falls rather within the passage quoted with approval by SELWYN, L.J., in *The Halley* (5), at p. 203, from STORY ON CONFLICT OF LAWS, p. 32 :

It is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the **G** rights of other nations or to those of their subjects.

It certainly cannot be on the ground of the comity of nations. I have not found any case where the court has acceded to such an argument as that relied upon by the defendants before me, the effect of which, if it were assented to, would be that the legislature of Hungary may **H** enact that the National Bank of Hungary, and not the English courts, are to decide when, if ever, a debt payable by a resident in Hungary under an English contract in sterling in London is to be discharged. I do not propose to be the first to do so. Two cases have been called to my attention where a similar argument has been rejected in the

United States of America: *Glynn v. United Steel Works Corporation* (6) and *Central Hanover Bank & Trust Co. v. Siemens & Halski A.G.* (7). With the results of these cases I respectfully agree. The plaintiffs are therefore entitled to the relief which they claim.

A Solicitors : *Linklaters & Paines* (for the plaintiffs) ; *Slaughter & May* (for the defendants).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

EAVES v. EAVES.

B [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), April 19, 28, 1939.]

Divorce—Desertion—Separation deed—Marital intercourse subsequent to deed—Abandonment of deed.

C In 1932, the petitioner and her husband separated in pursuance of a deed of separation, which provided, *inter alia*, that, should they be reconciled and return to cohabitation, the stipulations of the deed should become void. The husband made no payments under the deed, but for the first year his mother made payments on his behalf. From the date of the separation until 1935, the parties maintained friendly relations, and met frequently, and on a number of occasions marital intercourse took place. On Feb. 23, 1935, one of their children died, and on that day the parties met, when marital intercourse again took place. Thereafter, however, they met but seldom, and, on such occasions as they did meet, the husband showed no affection for the petitioner, and no desire to have anything more to do with her. The petitioner brought the present petition for divorce, alleging desertion for a period of 3 years immediately preceding the presentation of the petition :—

E HELD : the acts of intercourse were, in the circumstances of this case, such evidence of a resumption of cohabitation as was sufficient to put an end to the deed. The respondent had deserted the petitioner from Feb., 1935, until the date of the institution of the proceedings, and she was, therefore, entitled to a decree *nisi*.

F [EDITORIAL NOTE. In this case, the question of the repudiation of a deed of separation again arises. Here the repudiation arises by reason of marital intercourse subsequent to the deed in conjunction with the stopping of payments under the deed. In these circumstances, it is held that the deed is repudiated, since the resumption of intercourse was not merely casual, but amounted to a resumption of cohabitation.

G AS TO DESERTION AND SEPARATION DEEDS, see HALSBURY, Hailsham Edn., Vol. 10, p. 657, para. 966 ; and FOR CASES, see DIGEST, Vol. 27, pp. 317, 318, Nos. 2940-2956.]

Case referred to :

- (1) *Rowell v. Rowell*, [1900] 1 Q.B. 9 ; 27 Digest 246, 2172 ; 69 L.J.Q.B. 55 ; 81 L.T. 429 ; *subsequent proceedings* (1903), 89 L.T. 288.

H UNDEFENDED PETITION by wife for dissolution of marriage on the ground of desertion. The facts are fully set out in the judgment.

B. M. Cloutman for the petitioner.

HODSON, J. : This is an undefended suit for dissolution on the ground of desertion. The parties were married in 1928, and there were

originally 3 children of the marriage, the youngest of whom was born on Nov. 10, 1930. The parties lived together near Bristol for some years, the husband being engaged in business there. In 1932, he decided he would give up business and start a new profession, which involved leaving Bristol and coming to London. There had been no really serious differences between the parties, but they agreed to separate, and, in order that the wife's position might be secured, a deed of separation was executed on Feb. 1, 1932, in the usual form, reciting unhappy differences and that the parties had agreed to live separate and apart. It was provided that the husband and wife should thenceforth during their joint lives live separate and apart from each other, that the wife should have the custody of the children and the husband should have access to them, that during the joint lives of himself and the wife, if they so lived separate from each other, the husband should pay to the wife an allowance for the maintenance of the children, and finally, by cl. 7, that, if the husband and wife should be reconciled and return to cohabitation, the stipulations of the deed should become void. It was recognised, notwithstanding the terms of the deed, that the situation was temporary.

Very soon after the execution of the deed, the parties met, the husband being in London where he was studying for his new profession. Later on, in 1934, the wife took up work herself, thinking that that would encourage her husband in his studies. The husband himself never made any payment under the deed in compliance with the covenants contained therein, but for a year afterwards the separation payments were made on his behalf by his mother. Meanwhile the relationship between the parties was of a friendly nature, and they met frequently in London and elsewhere until Feb., 1935. During this month, Jennifer, one of the children, was ill in hospital, and was visited by her father on a number of occasions. On Feb. 23, 1935, Jennifer died. The husband met the wife on that day, and went back with her to the place where she was living and working. They slept together that night, and marital intercourse took place, it having taken place since the separation on a number of previous occasions when the parties had met in the friendly manner to which I have referred. A week later, the wife saw the husband, who was still very friendly towards her, but after that she seldom saw him again, and, when she did, he showed no affection for her, was not ready to do anything for her, refused her request to tell her where he was living, and manifested his desire to have no more to do with her. The petition was presented in Nov., 1938, more than 3 years after the occasion of the intercourse which took place between the parties for the last time following the death of the child.

In Jan., 1939, during the pendency of the suit, the husband saw the wife and complained that she was asking for alimony. She said that she would drop the proceedings if he would come back, but he said that he never wanted to live with her again. I am satisfied that the wife

was at all material times anxious that her husband should return to her, and the question which I have to determine is whether or not desertion has been established as against the husband. There is no doubt that the deed of separation of Feb. 1, 1932, was a consensual agreement, and the question is whether it ceased to have effect by reason of the
A operation of cl. 7, the husband having on a number of occasions, down to and including Feb., 1935, had marital intercourse with his wife. The fact that intercourse has taken place is not in itself conclusive evidence that separation has come to an end so as to make the deed of no effect (see *Rowell v. Rowell* (1)), and the court has to determine in
B a case such as the present whether there was any intention by the parties to come together again. In the words of LORD RUSSELL OF KILLOWEN, L.C.J., in *Rowell v. Rowell* (1), at p. 13 :

... if the court comes to the conclusion that there was an intention by both parties to come together again, there would be an end of the deed.

C In contrast to *Rowell's* case (1), the evidence here is all in favour of the contention put forward on behalf of the wife that the deed was no longer binding. At the time when the last act of intercourse took place, payments had long since ceased on behalf of the husband, and there is no indication that either party treated the deed as still in
D force. I do not hold that the acts of intercourse between the parties to which I have referred were mere casual and isolated acts, but I find that they are, in the circumstances of this case, evidence of a resumption of cohabitation sufficient to put an end to the deed, and, on the true construction of this deed, events have happened which have put an end
E to it. I therefore hold that, as from Feb., 1935, until the date of the institution of these proceedings, the husband has deserted his wife, and she is entitled to a decree *nisi* of dissolution on this ground.

Decree nisi granted.

Solicitors : *Hewitt, Woollacott & Chown* (for the petitioner).

[Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

G *Re* DAVID MOSELEY & SONS, LTD., *MOSELEY v. DAVID MOSELEY & SONS, LTD.*

[CHANCERY DIVISION (Simonds, J.), **May 11, 1939.**]

H *Companies—Directors—Retirement by rotation—Article providing for annual retirement of one-third of number or if number not a multiple of three then the number nearest to but not exceeding one-third—Only two directors subject to article.*

An article of association of a company provided that at every ordinary general meeting one-third of the directors (other than the governing directors and managing director or directors), or, if their number was not a multiple of 3, then the number nearest to, but not exceeding, one-third, should retire from office. In 1936, excluding the governing directors and managing director, there were only two

ordinary directors, and the question then arose as to the construction of the article in these circumstances:—

HELD: the article did not provide for the retirement of a director unless either there was a number which was one-third of the directors or there was a number which was nearer to, but did not exceed, one-third. As neither of these conditions was fulfilled, the article did not provide for the circumstances of this case, and no director had to retire by rotation in 1936.

[EDITORIAL NOTE.] This case presents a contingency unprovided for in the article of association drawn in common form and dealing with the retirement of directors by rotation. The article did not provide for the occasion when there were less than three directors subject to it. The article has recently been rectified in the precedent books, but there still remained the question of the construction of the old article. The circumstances making such construction necessary arose in this case, and the court has construed the article with the result that no director has to retire in such circumstances.

AS TO RETIREMENT OF DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 340-344, paras. 560-565; and FOR CASES, see DIGEST, Vol. 9, pp. 526-528, Nos. 3465-3483.]

ADJOURNED SUMMONS asking for the determination of whether or not, on the true construction of art. 94 of the articles of association of the defendant company, the plaintiff was liable to retire from the office of director in 1936. The facts are fully set out in the judgment.

J. Pennycuik for the plaintiff.

Wilfrid Hunt for the defendants.

SIMONDS, J.: This case raises a somewhat curious point, which one would have thought would have come up for decision long before this, but apparently there is no real authority which assists me in the matter at all. Under the articles of association of the company, it is provided by art. 80 that the number of directors shall not be less than 3 or more than 5. Art. 81 provides as to who should be the first directors and art. 82 provides that each of the three gentlemen named in the preceding article should, subject to certain conditions, be a governing director of the company. Certain other articles, to which I think I need not refer, are more or less in common form. Then comes art. 94, which is in common form:

At the ordinary general meeting to be held in the year 1904 and at every succeeding ordinary general meeting, one-third of the directors (other than the governing directors and managing director or directors), or if their number is not a multiple of 3 then the number nearest to but not exceeding one-third, shall retire from office.

It is to be observed that the phrase there is "their number," and it is said that the phrase "their number" must mean the whole body of directors including the governing directors. That, I think, cannot be the true meaning. "Their number," I think, means the directors referred to above other than the two governing directors and the managing director. Art. 95 then goes on to deal with who were to be the one-third:

The one-third or other nearest number to retire at the ordinary meeting to be held in the year 1904 shall unless the directors agree among themselves be deter-

mined by lot, and in every subsequent year the one-third or other nearest number who have been longest in office shall retire.

Art. 96 provides as follows :

The company at any general meeting at which any directors retire in manner aforesaid shall fill up the vacated office by electing a like number of persons to be directors and may fill up any other vacancies.

A Arts. 97 to 100 contain further provisions in regard to the election of directors. The question which arises is this. In 1936, there were 6 directors, 3 of whom were governing directors, one was managing director and 2 were ordinary directors. Art. 94 has no reference to the governing directors or managing director. The question is whether it has any operation in regard to the plaintiff here as an ordinary director, and the ordinary director who had been longer in office, within the meaning of this article, than the other ordinary director.

B Before I come to state my views on the construction of this article, it is relevant to observe that the words which cause the difficulty—
C “but not exceeding one-third”—do not occur in Table A. Table A, art. 73, provides as follows :

At the first annual general meeting of the company the whole of the directors shall retire from office, and at the ordinary general meeting in every subsequent year one-third of the directors for the time being, or if their number is not 3 or a multiple of 3, then the number that is nearest one-third shall retire from office.

D That phrase “not exceeding one-third” finds no place in Table A. In the form given in PALMER’S COMPANY PRECEDENTS, the article, which, as far as I know, is to be found in all the editions prior to the 1938 edition, is in the following form [see 1938 Edn. at p. 688]:

E At the ordinary general meeting to be held in the year and at every succeeding ordinary general meeting, one-third of the directors, or if their number is not a multiple of 3, then the number nearest, but not exceeding one-third, shall (subject to the provisions of art. 97) retire from office and shall be eligible for re-election.

Therefore, so far in PALMER’S COMPANY PRECEDENTS there is no provision for the difficulty which arises in this case. The 1938 edition adds the

F following proviso [see p. 688]:

Provided always that if in any year the number of directors who are subject to retirement by rotation shall be two, one of such directors shall retire.

Thus it would appear that, between the time of the preceding edition and the edition of 1938, the doubt which has to be resolved in this case
G had occurred to the editor of PALMER’S COMPANY PRECEDENTS. The view put forward on behalf of the plaintiff is this. He says that, where there are only two directors to whom art. 94 can apply, the article can have no application, because it is not a case in which one can speak of one-third of the directors, for there are not three directors. It is not
H a case to which the alternative head of the article can refer, because, the number of directors not being a multiple of 3, there is no number of directors which does not exceed one-third, for one is more than one-third of two. Therefore, one cannot find a number which is nearer to, but does not exceed, one-third of two. On the other side, it is said that the words “not exceeding one-third” can have no relevance or

meaning, and must be excluded, where the number of directors is only two, because the purpose of art. 94 is to provide for the rotation of the directors and the retirement of some one or more directors.

I must admit that, in the course of the argument, my mind fluctuated a good deal between these views, but, on the whole, I have come to the conclusion that the doubt which obviously entered the mind of the editor of PALMER'S COMPANY PRECEDENTS was justified, and that, where there are only two directors, the condition of art. 94 in this form is not satisfied. The article, in my judgment, does not provide for the retirement of a director unless one of two conditions are satisfied—namely, either there must be a number which is one-third of the directors, or there must be a number which is nearer to, but does not exceed, one-third. Here it is clear that neither of those conditions is satisfied. There are two directors, and, therefore, one cannot find a number that is one-third. There are two directors, and, therefore, one cannot find a number which is nearer to, but does not exceed, one-third. Accordingly, although it may be that the general intention of this particular article is not satisfied, the answer is that the articles will have to be altered to give effect to what may well be the intention of the company. Accordingly, I must answer the question asked by saying that :

... on the true construction of art. 94 of the articles of association of the defendant company and in the events which have happened the plaintiff did not retire from office by rotation at the annual general meeting of the defendant company held on July 19, 1936.

Solicitors : *Slater, Heelis, Sandbach, Marriott, Smiths & Irvine, Manchester* (for the plaintiff) ; *Skelton & Co., Manchester* (for the defendants).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

SWAIN v. SOUTHERN RAILWAY CO.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and du Parc, L.J.J.).

April 28, May 1, 2, 3, 18, 1939.]

Highways—Repair—Bridge carrying road over railway—Liability of railway company for non-feasance—Extent of liability to repair—Railways Clauses Consolidation Act, 1845 (c. 20), s. 46.

Public Authorities—Limitation of actions—Whether railway company a public authority—Public Authorities Protection Act, 1893 (c. 61), s. 1.

The plaintiff, a steam-crane driver, in proceeding to his work on his bicycle, had to cross a bridge belonging to the defendant company. The road over it and the approach thereto were alleged to be in a bad state of repair, there being several potholes and a rut, about 2 ft. from the near side, several inches deep in some places, extending a number of yards from the crown of the bridge down the incline, and said to have been caused in the course of time by rainwater. The plaintiff's machine got into the rut and he was thrown to the ground and suffered severe injuries to his head. It was found as a fact that the accident was caused by the want of repair of the road over the bridge. The claim was based on negligence, nuisance, and breach of the statutory

duty of the defendants to maintain the road on the bridge and the approach thereto. The bridge had been constructed by the defendant's predecessors under the South Western Exeter Extension Act, 1856, incorporating the Railways Clauses Consolidation Act, 1845. It was contended on behalf of the defendants (i) that the defendants were in a position similar to that of a highway authority, and were not liable for non-feasance; (ii) that they were entitled to the benefit of the Public Authorities Protection Act, 1893; (iii) that they were only liable to maintain the road over the bridge for the purposes of the traffic using the road in the year in which it was constructed :—

HELD : (i) by the Railways Clauses Consolidation Act, 1845, s. 46, the company were liable for non-feasance as well as misfeasance.

(ii) a railway company is not a public authority within the meaning of that term as used in the Public Authorities Protection Act, 1893, s. 1.

(iii) the road was in fact in a condition which would have been dangerous to traffic as it was at the date at which the bridge was constructed; but the duty of a railway company under the Railways Clauses Consolidation Act, 1845, s. 46, is to maintain the bridge and its approaches in the state they are when constructed in accordance with that section, and that necessarily implies an absence of dangerous ruts.

Decision of HUMPHREYS, J. ([1938] 3 All E.R. 705) affirmed.

[EDITORIAL NOTE.] The duty of a railway company to maintain a road over a bridge is here distinguished from the similar duty of a local authority. The railway company on the one hand are liable for non-feasance, but, on the other, they are only liable to maintain the road as originally constructed, despite the fact that the nature of the general traffic of the district has altered. There is a further point, quite apart from the foregoing, and that is whether a railway company is a public authority within the meaning of the Public Authorities Protection Act, and in this matter the opinion voiced in *A.-G. v. Margate Pier & Harbour Co. of Proprietors* (1), that the protection of the Act does not extend to companies working for a profit, is confirmed.

AS TO LIABILITY TO REPAIR ROADWAY OVER BRIDGE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 407, 408, para. 574; and FOR CASES, see DIGEST, Vol. 26, pp. 580-582, Nos. 2709-2719.

AS TO PARTIES WITHIN PROTECTION OF THE PUBLIC AUTHORITIES PROTECTION ACT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-293, para. 610; and FOR CASES, see DIGEST, Vol. 38, pp. 102-106, Nos. 732-758.]

Cases referred to :

- (1) *A.-G. v. Margate Pier & Harbour Co. of Proprietors*, [1900] 1 Ch. 749; 38 Digest 102, 734; 69 L.J.Ch. 331; 82 L.T. 448.
- (2) *The Ydun*, [1899] P. 236; 38 Digest 102, 732; 81 L.T. 10; *affd.*, [1899] P. 342.
- (3) *Parker v. London County Council*, [1904] 2 K.B. 501; 38 Digest 103, 739; 73 L.J.K.B. 561; 90 L.T. 415.
- (4) *Bradford Corp'n. v. Myers*, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; *affg.*, [1915] 1 K.B. 417.
- (5) *Lanarkshire Upper Ward District Committee v. Airdrie, Coatbridge & District Water Trustees* (1906), 8 F. (Ct. of Sess.) 777; 38 Digest 105, case b.
- (6) *Russell v. Men of Devon* (1788), 2 Term Rep. 667; 26 Digest 587, 2780.
- (7) *Young v. Davis* (1863), 2 H. & C. 197; 26 Digest 398, 1241; 9 L.T. 145; *affg.* 7 H. & N. 760.
- (8) *Cowley v. Neumarket Local Board*, [1892] A.C. 345; 26 Digest 400, 1251; 62 L.J.Q.B. 65; 67 L.T. 486.

- (9) *Sydney Municipal Council v. Bourke*, [1895] A.C. 433, 26 Digest 400, 1254; 64 L.J.P.C. 140; 72 L.T. 605.
- (10) *Maguire v. Liverpool Corpn.*, [1905] 1 K.B. 767; 26 Digest 400, 1255; 74 L.J.K.B. 369; 92 L.T. 374.
- (11) *Hartnall v. Ryde Comrs.* (1863), 4 B. & S. 361; 26 Digest 399, 1242; 33 L.J.Q.B. 39; 8 L.T. 574.
- (12) *Pictou Municipality v. Geldert*, [1893] A.C. 524; 26 Digest 400, 1252; 63 L.J.P.C. 37; 69 L.T. 510.
- (13) *Dublin United Tramways Co. v. Fitzgerald*, [1903] A.C. 99, 43 Digest 344, 37; 72 L.J.P.C. 52; 87 L.T. 532.
- (14) *Parkinson v. Garstang & Knott End Ry. Co.*, [1910] 1 K.B. 615; 38 Digest 310, 334; 79 L.J.K.B. 380; 102 L.T. 234.
- (15) *Lyles v. Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; 38 Digest 102, 733; 74 L.J.K.B. 484; 92 L.T. 568.
- (16) *The Danube II*, [1921] P. 183; 38 Digest 103, 741; 90 L.J.P. 314; 125 L.T. 156.
- (17) *A.-G. v. Great Northern Ry. Co.*, [1916] 2 A.C. 356; 26 Digest 582, 2719; 85 L.J.Ch. 717; 115 L.T. 235.
- (18) *Square v. Model Farm Dairies (Bournemouth), Ltd.*, [1938] 2 All E.R. 740; Digest Supp.: 159 L.T. 40; *varied*, [1939] 1 All E.R. 259; 108 L.J.K.B. 198; 160 L.T. 165.
- (19) *Fielding v. Morley Corpn.*, [1899] 1 Ch. 1; 42 Digest 604, 52; 67 L.J.Ch. 611; 79 L.T. 231; *affd.*, [1900] A.C. 133.
- (20) *The Ronald West*, [1937] P. 212; Digest Supp.; 106 L.J.P. 133; 158 L.T. 70.
- (21) *Edwards v. Metropolitan Water Board*, [1922] 1 K.B. 291; 38 Digest 111, 795; 91 L.J.K.B. 210; 126 L.T. 300.
- (22) *Lancashire & Yorkshire Ry. Co. v. Bury Corpn.* (1889), 14 App. Cas. 417; 26 Digest 586, 2776; 59 L.J.Q.B. 85; 61 L.T. 417; *affg.* (1888), 20 Q.B.D. 485.
- (23) *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] A.C. 365; [1936] 1 All E.R. 692; Digest Supp.; 105 L.J.Ch. 133; 154 L.T. 409.
- (24) *Manchester Corpn. v. Audenshaw Urban Council and Denton Urban Council*, [1928] Ch. 763; Digest Supp.; 97 L.J.Ch. 276; 139 L.T. 509; *varying* [1928] Ch. 127.
- (25) *Chichester Corpn. v. Foster*, [1906] 1 K.B. 167; 26 Digest 431, 1500; 75 L.J.K.B. 33; 93 L.T. 750.
- (26) *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.*, [1915] A.C. 654; 26 Digest 581, 2716; 84 L.J.K.B. 907; 112 L.T. 826; *revsg.*, [1914] 3 K.B. 1.
- (27) *Powell v. Brown*, [1899] 1 Q.B. 157.
- (28) *South Eastern Ry. Co. v. Railway Comrs.* (1881), 6 Q.B.D. 586; 38 Digest 358, 618; 50 L.J.Q.B. 201; 44 L.T. 203; *revsg.* (1880), 5 Q.B.D. 217.
- (29) *Newell v. Starkie* (1919), 89 L.J.P.C. 1; 38 Digest 119, 854.
- (30) *Palmer v. Grand Junction Ry. Co.* (1839), 4 M. & W. 749; 38 Digest 110, 789; 8 L.J.Ex. 129.
- (31) *Monk v. Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.
- (32) *R. v. St. George, Hanover Square (Inhabitants)* (1812), 3 Camp. 222; 26 Digest 366, 917.
- (33) *R. v. Brightside Bierlow (Inhabitants)*, *R. v. Attercliffe cum Darnal (Inhabitants)*, *R. v. Tinsley (Inhabitants)* (1849), 13 Q.B. 933; 26 Digest 304, 359; 19 L.J.M.C. 50; 14 L.T.O.S. 103.

- (34) *Hood v. North Eastern Ry. Co.* (1870), 5 Ch. App. 525; 38 Digest 298, 270; 23 L.T. 206.
- (35) *Harnett v. Fisher*, [1927] A.C. 573; Digest Supp.; 96 L.J.K.B. 856; 137 L.T. 602.
- (36) *The Johannesburg*, [1907] P. 65; 38 Digest 103, 738; 76 L.J.P. 67; 96 L.T. 464.
- A (37) *Blundy, Clark & Co., Ltd. v. London & North Eastern Ry. Co.*, [1931] 2 K.B. 334; Digest Supp.; 100 L.J.K.B. 401; 145 L.T. 269.
- (38) *English v. Metropolitan Water Board*, [1907] 1 K.B. 588; 38 Digest 106, 756; 76 L.J.K.B. 361; 96 L.T. 573.
- (39) *Mersey Docks Trustees v. Gibbs* (1866), L.R.1 H.L. 93; 38 Digest 76, 541; 11 H.L. Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; *affg.* S.C. *sub nom.*
- B *Gibbs v. Liverpool Docks Trustees* (1858), 3 H. & N. 164; S.C. *sub nom.* *Mersey Docks & Harbour Board v. Penhallow* (1861), 7 H. & N. 329.
- (40) *Ayr v. St. Andrews Ambulance Assocn.*, [1918] S.C. 158; 38 Digest 125, case p.

APPEAL by the defendants from a judgment of HUMPHREYS, J., dated July 30, 1938, and reported [1938] 3 All E.R. 705. The case arose out of an accident which occurred at 5.40 a.m. on Aug. 7, 1936, when the plaintiff suffered injuries while cycling down a road forming an approach to a bridge which was owned by the appellants and situated near Chard Junction in the county of Somerset. The respondent was accustomed to ride his bicycle over the bridge. The writ in the action was issued on May 27, 1937, and the railway company claimed the protection of the Public Authorities Protection Act, 1893. The railway company also claimed that their obligation to maintain the road did not require them to do more than maintain it in the condition which was appropriate for traffic in 1856, when the bridge was constructed. They further claimed to be in the position of a highway authority in respect of their obligation to maintain the road, and therefore not liable for non-feasance, but only for misfeasance. Contributory negligence of the respondent was also alleged.

J. G. Trapnell, K.C., and *A. T. Denning, K.C.*, for the appellants.

F *J. Lhind Pratt* for the respondent.

Trapnell, K.C.: The duty of the railway company extends only to maintaining the road in the condition in which it was when the bridge was constructed. In repairing and maintaining the road, the railway company is acting as a public authority, and must have the protection of the Public Authorities Protection Act, 1893. There is a difference between a duty voluntarily assumed and a duty which one is bound to perform. The railway company is under a statutory obligation to maintain the road. In *Lyles v. Southend-on-Sea Corpn.* (15), at p. 12, VAUGHAN WILLIAMS, L.J., said that the rule was wide enough to give the protection of the section to any person acting in pursuance or execution of an Act of Parliament. There is no satisfactory authority for not taking the view that a railway company is a public authority when it is performing public duties. In *The Danube II* (16), the protection of the Act was held to cover servants of the Crown acting within the scope of their public duties. In the Larceny Act, 1861, there was power for proceedings to

be taken by private persons, and those proceedings would no doubt be a public duty. The Larceny Act, 1861, s. 113, is in part repealed by the Public Authorities Protection Act, 1893, s. 2. The Act of 1861 imposed a public duty upon a person who was not a public authority. If sect. 113 is to be repealed by an Act intended to bring things into a common form, it is reasonable to say that the Act of 1893 is intended to benefit bodies acting as public authorities in the way the Act is intended to give protection. With regard to the duty to repair and the standard of repair, there is no duty to maintain in accordance with modern standards, but only in accordance with its condition at the date of completion : *A.-G. v. Great Northern Ry. Co.* (17). The question as to whether or not a railway company is liable for non-feasance will depend upon whether or not the company has the common law protection of owners of highways. A local authority is protected from liability for non-feasance, because private persons have no remedy against them. The Railways Clauses Consolidation Act, 1845, s. 65, gives justices power to order the repair of bridges. That must be taken to include roads over bridges. The railway company has inherited the protection given to local authorities in respect of non-feasance, because the railway company is the highway authority for this particular part of the road. Unless an intention to impose a liability for injury can be found in the 1845 Act, no action will lie at the instance of an individual. As, by the Highways Act, 1835, s. 5, no action can be brought against the surveyor or the local authority, so no action can be brought against the railway company. The matter is concluded by the Railways Clauses Consolidation Act, 1845, ss. 46, 65, which provide that justices have power to require that a bridge be kept in repair. If the railway company fails to keep the bridge in repair, the only remedy is that provided by sect. 65. It would have been easy for Parliament to have imposed a liability to pay damages, but Parliament has not done so. In *Maguire v. Liverpool Corpn.* (10), it was stated that *Hartnall v. Ryde Comrs.* (11) must be treated as a decision on the special wording of the Act there in question. It should not be inferred that a railway company is to have a greater liability than that which a local authority has. The Railways Clauses Consolidation Act, 1845, empowers a railway company to lower a road so that it may pass under the line, in which case there is no liability upon the railway company to repair the road at all. The right explanation of the difference is that it was thought more convenient that two authorities should not be responsible for a bridge, and therefore Parliament put upon the railway company the liability of maintaining both bridge and road. In *Young v. Davis* (7), WILLES, J., said that the remedy for omission to repair was formerly by indictment, and that the Highways Act, 1835, was passed to provide machinery whereby the existing duty to repair might be conveniently fulfilled. That was not a case concerning a railway company. Where a special remedy is provided by statute, there is a presumption that there is no right of action by a private individual : *Square v. Model Farm Dairies (Bournemouth), Ltd.* (18).

[Counsel referred to *Fielding v. Morley Corpn.* (19), *The Ydun* (2), *Bradford Corpn. v. Myers* (4), *A.-G. v. Margate Pier & Harbour Co. of Proprietors* (1), *The Ronald West* (20), *Edwards v. Metropolitan Water Board* (21), *Lancashire & Yorkshire Ry. Co. v. Bury Corpn.* (22), *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council* (23), *Manchester Corpn. v. Audenshaw Urban Council and Denton Urban Council* (24), *Chichester Corpn. v. Foster* (25), *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.* (26), *Cowley v. Newmarket Local Board* (8), *Pictou Municipality v. Geldert* (12) and *Powell v. Brown* (27).]

A *Denning, K.C.* : The duty owed by the railway company is either to the public at large or to the highway authority, but not to any individual member of the public. On no view is the section one which gives rise to an action for damages. The Railways Clauses Consolidation Act, 1845, draws a distinction between a road over a bridge and the bridge itself. It leaves the management of the road in the highway authority. The responsibility of the highway authority to the public is not only to make the highway safe according to the old standard but also to raise that standard from time to time. Side by side with the obligation which rests upon the inhabitants, there is the lesser obligation of the railway company. The latter cannot prevent any heavier traffic or any additional traffic from passing over the bridge. It follows that the duty to the public must be owed by those who have the whole duty to repair placed upon them, and not by the body on which a part only of the duty is placed. In *Young v. Davis* (7), MARTIN, B., puts the reasons upon a logical foundation, and the reasons which applied in that case apply in the present case also. *South Eastern Ry. Co. v. Railway Comrs.* (28) shows that the liability remains upon the inhabitants notwithstanding that an obligation is imposed upon somebody else. If the railway company is liable in the present case, it will follow that the highway authority, though at present not liable for non-feasance, will become liable if it takes over the railway company's liability to repair, under the provisions contained in the Bridges Act, 1929. The Bridges Act, 1929, provides that the liability of a railway company may be transferred to a local authority. The Act recognises that there is no liability for non-feasance. In the Public Authorities Protection Act, 1893, public authority means anyone acting in the performance of a statutory duty for the benefit of persons generally. It is not a question of status, but of the duties to be performed. It is the function which is protected, and not the person : *Newell v. Starkie* (29). In *Palmer v. Grand Junction Ry. Co.* (30), the distinction was drawn by PARKE, B., between the functions of a railway company as common carriers and the functions of a railway company as the proprietors of a highway. The only way of defining a public authority for the purpose of the Public Authorities Protection Act, 1893, is to look at the duty. The question of non-feasance is linked in an inseparable way with the question as to whether or not there is a remedy by way of damages. The first question depends upon the construction of the Railways

Clauses Consolidation Act, 1845, s. 46. The reasons which apply at common law apply equally in the case of a duty imposed by statute. I rely particularly upon *Young v. Davis* (7). *Prima facie*, when there is one remedy given, another remedy is not available: *Monk v. Warbey* (31). [Counsel referred to *Cowley v. Newmarket Local Board* (8), *Lancashire & Yorkshire Ry. Co. v. Bury Corpn.* (22), *R. v. St. George, Hanover Square* (Inhabitants) (32), *R. v. Brightside Bierlow* (Inhabitants) (33), *Hood v. North Eastern Ry. Co.* (34), *Harnett v. Fisher* (35), *The Johannesburg* (36), *Blundy, Clark & Co., Ltd. v. London & North Eastern Ry. Co.* (37) and *Manchester Corpn. v. Audenshaw Urban Council and Denton Urban Council* (24).] A B

Pratt: With regard to the liability to repair the road, it was decided by EVE, J., in *Manchester Corpn. v. Audenshaw Urban Council and Denton Urban Council* (24) that the local authority was only liable to maintain the road in the state in which it was when it was completed. The same wording is to be found in the Railways Clauses Consolidation Act, 1845, as is contained in the Act which was considered in that case. The railway company is under an obligation to maintain the road over this particular bridge in the condition in which it was in 1856. It is clear on the evidence that it failed to maintain the road to the required standard, and that it allowed the rut in question to exist. With regard to the Public Authorities Protection Act, 1893, all the cases cited on behalf of the appellants are cases in which the body held entitled to the protection of the Act was a body discharging a public duty without any purpose of making a profit. One gets no assistance from isolated passages in the judgments in these cases. A railway company is clearly not a public authority. To say that it is, is to ignore the short title of the Act. The line of authorities which draws a distinction between public authorities and trading corporations is entirely justified by the Act. That division has been acted upon by writers of text-books, as, for instance, LIGHTWOOD ON THE TIME LIMIT OF ACTIONS, and HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 26, p. 293. In *English v. Metropolitan Water Board* (38), it was conceded that the Public Authorities Protection Act, 1893, applied to the Metropolitan Water Board, but the judgment does not say why the protection of the Act was refused to the Kentish Water Board. It may be that it was trading for the profit of its shareholders. If I am giving the right reason, the case is a useful one in support of my argument. There is a consistent body of authority, extending from 1899 to 1916, laying down the proposition that the Act applies to those bodies which come within its short title, and to those bodies only. There is no authority to the contrary. The argument addressed to the court with regard to non-feasance had interwoven with it the argument that, owing to a criminal liability having been imposed by the Railways Clauses Consolidation Act, 1845, s. 46, it must be assumed that that was the only way in which the liability of the railway company could be enforced, and C D E F G H

that an action by an individual was excluded. The material section of the Act of 1845 is sect. 65, and that section is not confined to liability in respect of roads. *Parkinson v. Garstang & Knott End Ry. Co.* (14) is one of numerous cases which deal with breach of statutory duty under sect. 65, so far as a penalty is imposed for the breach. The cases have
A been uniformly decided over a long period of time. It is unthinkable that they are wrong and that the liability of the company must be limited to a mere penalty. With regard to sect. 46, it is clear that Parliament was considering the public when it imposed the obligation upon the railway company. If a member of the public is injured by a breach
B of that statutory duty, he is entitled to recover damages for that breach. The railway company has cast upon it a liability greater than that cast upon a highway authority. The exemption from liability for non-feasance is a privilege which has been accorded to highway authorities, but that immunity has never been given to a body which is not a local
C authority. In *Mersey Docks Trustees v. Gibbs* (39), the harbour board was held liable for non-feasance. That indicates that the exemption from liability is exceptional. The exemption is limited to highway authorities, and does not extend to trading corporations such as a railway company. [Counsel referred to *A.-G. v. Margate Pier &*
D *Harbour Co. of Proprietors* (1), *Parker v. London County Council* (3), *Lyles v. Southend-on-Sea Corpn.* (15), *Blundy, Clark & Co., Ltd. v. London & North Eastern Ry. Co.* (37), *Maguire v. Liverpool Corpn.* (10) and *Dublin United Tramways Co. v. Fitzgerald* (13).]

SIR WILFRID GREENE, M.R., referred to *Lanarkshire Upper Ward*
E *District Committee v. Airdrie, Coatbridge & District Water Trustees* (5) and *Ayr v. St. Andrews Ambulance Assocrn.* (40).

Trapnell, K.C., in reply: The point we are raising is that the function as regards the road is not part of the railway company's business. A railway company is not bound to take the highway over the railway
F line. It is given an option to carry the road either over or under the line. In *Lancashire & Yorkshire Ry. Co. v. Bury Corpn.* (22), it is pointed out that, if there were two authorities repairing a bridge and its approaches, inconvenience would be caused. One is driven to conclude, therefore, that, upon a true construction of the Railways Clauses Consolidation Act,
G 1845, it was a matter of convenience only which operated upon the mind of Parliament. This is emphasised by the fact that no duty to repair a road has been imposed when the road goes under the line. It must follow, therefore, that Parliament intended to impose upon a railway company only the same obligation to which a local authority is subject.
H It is also useful to consider the observations of LORD SUMNER in *A.-G. v. Great Northern Ry. Co.* (17) on the meaning of the word "maintain." Those observations apply in the present case, because the word "maintain" does suggest that there never was an intention that the obligation should carry with it an obligation to improve the standard of the road. The functions can be separated. The obligation to maintain was imposed

upon railway companies for the purpose of convenience, and for no other purpose. With regard to the Public Authorities Protection Act, 1893, the test of the construction of that Act must be the operative words. In so far as it is suggested that the short title can be used to construe the meaning, it is saying that, if the short title is inconsistent with the long title, one can use the short title to limit the sense of the long title. A If Parliament had wanted to limit the application of the Act to local authorities, it would have said so. *Blundy, Clark & Co., Ltd. v. London & North Eastern Ry. Co.* (37) does not deal with the points which arise in the present case. That case deals with a water highway and the failure to maintain the lock gate, and the doctrine of non-feasance would B have no application. [Counsel referred to *Parkinson v. Garstang & Knott End Ry. Co.* (14) and *Square v. Model Farm Dairies (Bournemouth), Ltd.* (18).]

FINLAY, L.J. [delivering the judgment of the court]: This action C was brought by the plaintiff, now the respondent, claiming damages against the defendants, now the appellants, the Southern Railway Co., in respect of serious injuries which he received when cycling down a road forming an approach to a bridge called Ammerham Bridge, near Chard Junction, in the county of Somerset. The action was based upon the D alleged failure of the defendant company to fulfil their obligations to maintain the roadway. HUMPHREYS, J., decided in favour of the plaintiff, and awarded him £1,590 damages. The defendants appeal from the decision of the judge, and questions both of fact and of law were raised before us. E

Ammerham Bridge is a bridge over the main line of the defendant railway company. The part of the line in question was made under a private Act, the South Western Exeter Extension Act, 1856. That Act incorporates the Railways Clauses Consolidation Act, 1845. It is desirable to set out sect. 46 of the Act of 1845, for on its construction this F case to a large extent depends. Sect. 46 provides as follows :

If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and G all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: Provided always, that, with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level.

It was common ground that this accident happened on the approach to the bridge, at a spot where the defendants came under the obligations H expressed by the words :

. . . such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained, at the expense of the company. . . .

The plaintiff was riding his bicycle on this approach when he was thrown

from it, and sustained the injuries in respect of which he claims damages. His evidence, which was accepted by the judge, was to the effect that he was thrown from his bicycle by reason of the fact that the wheels got into a rut, the rut being probably about 3 ins. deep, or a little more, and from 6 ins. to 9 ins. wide. There was evidence that the forks broke,

- A and it was said for the defendants that the cause of their breaking was a defect in the machine. HUMPHREYS, J., found that at some time previous to the date of the accident there had been some damage to the stem, with the result that it was "a fatigued piece of metal," but, finding to that extent favourably to the defendants, he none
B the less held that the rut was a dangerous rut, and was the proximate cause of the breaking of the machine. In our opinion, the judge was well warranted in arriving at that finding of fact, and we cannot interfere with it.

- C It was contended before the judge, and, though somewhat faintly, before us, that the defendants had made out a case of contributory negligence, the negligence suggested being, of course, that, if the plaintiff was keeping a proper look out, and riding with due care, he ought to have seen and to have avoided the rut, of the existence of which he was previously aware. This matter is, of course, entirely a question of fact
D and degree, depending upon the evidence, and particularly upon the evidence of the plaintiff, whom the judge saw and heard. He arrived at the conclusion that the plea of contributory negligence was not made out, and we see no ground for interfering with his decision on that point.

- E There was argument before us, as also before the judge, as to the standard of repair which ought to be applied. As to that, the judge accepted the view urged upon him by the defendants' counsel—namely, that the standard to be applied was that the road must be maintained in a condition suitable for such traffic as existed in 1856. Applying that test, the judge found as a fact that the road was not so maintained,
F and again we must decline to interfere with his finding. This, again, is essentially a question of fact and of degree. It is impossible, of course, to suppose that the road ever could, or ever would, be maintained precisely in the state in which it was when completed as a perfectly new road, but the judge has found that, as the road was on the date of this
G accident, it was dangerous, not only to bicycles, but also to gigs and dogcarts, vehicles which have not entirely died out now, and which were, no doubt, common in 1856. This is a matter on which we think the judge was well warranted in using the knowledge which he possessed, and, as we have said, we decline to interfere with his finding.

- H This brings us to the law on the matter, which was very fully and elaborately argued before us, mainly under two heads. The first of these heads was that the defendants were entitled to rely upon the Public Authorities Protection Act, 1893, and were, therefore, entitled to judgment, inasmuch as the action was not commenced within 6 months of the act of neglect or default complained of. The second head was

entirely distinct, although considerations in some respects analogous applied to it. It was contended that the effect of sect. 46 was to transfer to the railway company the rights and duties of the surveyor of highways, that the company accordingly stood in the shoes of the surveyor, and that it followed that they were not liable in an action for damages in respect of non-feasance. We deal with these points in their order. A We consider that the authorities make it clear that the Public Authorities Protection Act, 1893, cannot avail the defendants. A large selection from the numerous cases which have been decided on that difficult Act was cited to us. We think it unnecessary to refer to more than a very few of them. In *A.-G. v. Margate Pier & Harbour Co. of Proprietors* (1), B it was decided by KEKEWICH, J., following a *dictum* of SIR FRANCIS JEUNE, P., in *The Ydun* (2), that a company maintaining a pier and harbour and striving to make profits, was not within the protection of the Act, and in *Parker v. London County Council* (3) CHANNELL, J., approved of the decision of KEKEWICH, J. In *Bradford Corpn. v. Myers* (4), which has always been considered a leading case on this subject, LORD BUCKMASTER, L.C., cited with approval the decisions of KEKEWICH, J., and of CHANNELL, J., above referred to, and said, at p. 247 : C

Now it must be conceded that the Act applies only to a definite class of persons and to a definite class of action. If the section stood alone, and were construed without reference to the introductory words of the statute, it would be wide enough to grant protection to any person who was acting in pursuance of a private Act of Parliament, but on more than one occasion the courts have pointed out that this cannot be its true interpretation, and that "any person" must be limited so as to apply only to public authorities. D

The point is expressed with great clearness in a case in the Court of Session in Scotland, *Lanarkshire Upper Ward District Committee v. Airdrie, Coatbridge & District Water Trustees* (5). In the judgment of the Inner House of the Court of Session there, which was delivered by LORD M'LAREN, and to which Lord President DUNEDIN was a party, it is said, at p. 781 : E F

... there is a broad distinction between the position of public bodies such as county and parish councils or Parliamentary commissioners who are directed to perform public duties, the cost of which is to be defrayed by rates, and the position of incorporated companies who are empowered for their own purposes and with a view to profit to undertake work of the same description. In the one case the public body is under a legal obligation to proceed with the undertaking, but its members act gratuitously, and are neither entitled to make a profit nor are responsible for loss. . . . If a railway company elects to make use of its Parliamentary powers, it is in a certain sense executing an Act of Parliament, but it is not performing a public duty, and I think it would be foreign to the scope and purpose of the Public Authorities Protection Act to apply its provisions to the case of actions brought against commercial companies for acts or defaults in the execution of powers which they are under no obligation to put in force, and which they only use for their own benefit. G H

When the law, which is well settled, is applied to the present case, the result appears to be clear. The railway company obtained Parliamentary powers to make this line, which was no doubt useful to the public, but which they made hoping to derive profits for shareholders.

As one of what may be called the Parliamentary terms upon which they obtained their franchise, there was imposed upon them the duty of erecting and maintaining bridges and their approaches. The railway company carrying on its ordinary business is plainly not a public authority, and we did not understand that this was contested. We are quite unable to see how it can be said that this commercial company became a public authority because Parliament has thought fit to impose upon it duties in maintaining bridges and approaches to bridges. Whether or not, in some circumstances, a commercial company might, by reason of some special provision, be placed in the position of a highway authority is a point to which we shall advert later. We entertain a very clear opinion that here there is no ground for saying that the railway company was placed in the position of the surveyor. In his able and concise argument, counsel for the respondent contended that the point on the Public Authorities Protection Act was concluded by authority in his favour, and we think that he was justified in this contention.

We now turn to the second point, that relating to the liability, if any, of the defendants with reference to nonfeasance. It is thoroughly well settled that an action in respect of failure to repair a road would not lie against the inhabitants of the county : *Russell v. Men of Devon* (6). This principle has been held applicable to various public authorities to whom, in course of time, the duties of the inhabitants with respect to the repair of roads have been transferred. Thus, it was held in *Young v. Davis* (7) that an action for non-repair would not lie against a surveyor of highways. The same principle was applied to a local board in *Cowley v. Newmarket Local Board* (8), where LORD HALSBURY, L.C., at p. 350, referring to *Russell v. Men of Devon* (6), quotes as accurately stating the principle a passage from BROOKE'S ABRIDGMENT, entitled "Action on the Case" and a comment on it, where it is said :

... if a highway be out of repair by which my horse is mired no action lies, "*car est populus et surra reforme per presentment*," which must be understood to mean that as the road ought to be repaired by the public no individual can maintain an action against them for any injury arising from their neglect.

In that same case of *Cowley v. Newmarket Local Board* (8), the opinion of LORD HERSCHELL, has often been referred to as containing a full and authoritative statement of the law. I refer also to a passage in the opinion of the Privy Council delivered by LORD HERSCHELL, L.C., in *Sydney Municipal Council v. Bourke* (9), at p. 443. The same principle was applied in *Maquire v. Liverpool Corpn.* (10) to a city corporation to whom had been transferred the duty to repair. The general principle is thoroughly well established, and it is not necessary to pause to consider the somewhat vexed question whether *Hartnall v. Ryde Comrs.* (11) should be regarded as overruled or as a decision still standing but applicable only to the particular facts and the particular terms of the Act which were in question in that case. We may refer, as HUMPHREYS,

J., in the court below referred, to *Pictou Municipality v. Geldert* (12), where the law is thus summarised by LORD HOBHOUSE, delivering the judgment of the Board, at p. 527 :

The latest English case is that of *Cowley v. Newmarket Local Board* (8), decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the legislature has used language indicating an intention that this liability shall be imposed. A

In our opinion, the principle, so well settled by a long line of authorities, that a road surveyor or a local board or a public corporation responsible for the repair of roads is not liable to a person injured in respect of non-feasance has no application to a case such as the present. In order that the principle may apply, it must, in our opinion, be shown that the defendants seeking to avail themselves of the immunity are really the successors of, and have really had transferred to them, the duties and liabilities which originally rested on the inhabitants. This is very clearly seen in the passage from BROOKE'S ABRIDGMENT quoted by LORD HALSBURY, L.C., in *Cowley v. Newmarket Local Board* (8), a passage which LORD HALSBURY, L.C., quite plainly treated as applicable, not only to the inhabitants, but also to the public corporations, who had by transfer had imposed upon them the liabilities of the inhabitants. It applied to these public bodies, whether county council or local board or borough council or corporations, just because they were the representatives of, and stood in the shoes of, the inhabitants. It appears to us that, when the principle is understood, it becomes obvious that it can have no application to such a case as the present. The Southern Railway Co. cannot in any sense be said to represent, or stand in the shoes of, the inhabitants, and they have no general responsibility with regard to roads. They came under a liability to make and to repair bridges and their approaches as one of the terms imposed by Parliament by the Railways Clauses Consolidation Act, 1845, s. 46. The section has been quoted above, but the immediately relevant words may be once more quoted : B
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... and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company.

It is plain, in our opinion, that the principle originally applicable to the inhabitants, and applicable now to any public authority which may stand in the shoes of the inhabitants, has no application to a case such as the present, where a company carrying on its business for profit, as one of the terms upon which it is given power to make its line, comes under an obligation with reference to bridges and the approaches thereto. We attach importance to the fact that the obligation is primarily with reference to bridges. It would indeed be startling if a railway company who, by failing to repair a bridge, caused a hole in a road was not liable to any person suffering damage thereby. We should be prepared to rest the view we take upon principle, but there is authority to support it. G
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Dublin United Tramways Co. v. Fitzgerald (13) was an appeal from the Court of Appeal in Ireland, which had dismissed an appeal from the Court of King's Bench in Ireland. In the Court of King's Bench, PALLES, C.B., delivered the leading judgment. In that judgment, after quoting the principle stated in BROOKE'S ABRIDGMENT, and after referring to the principle established by *Russell v. Men of Devon* (6) and *Cowley v. Newmarket Local Board* (8), he said :

This principle, however, has never been applied to a trading corporation such as the present, and the principle upon which its extension has hitherto proceeded prevents it from being ever so applied. That principle rests upon the fact that in the matters complained of the exempted corporation represents the citizens that for the discharge of the duties entrusted to them, they are responsible to those whom they represent, and that if they fail to use their powers well they can be displaced at the next election. Bodies of this description in principle answer the description of the *populus* mentioned by BROOKE. This principle can have no application to the present case, in which the defendants are a private trading company.

Similar passages are to be found in the judgments of the Court of Appeal, particularly in that of WALKER, L.J., and, though the matter went on a somewhat different point in the House of Lords, the decision was there affirmed. We are glad to have the great authority of PALLES, C.B., in support of the principle which, in our opinion, governs this case.

We may also refer to *Parkinson v. Garstang & Knott End Ry. Co.* (14), where, on the Railways Clauses Consolidation Act, 1845, s. 61, which has reference to the provision of gates and stiles, and is analogous to sect. 46, it was held by a Divisional Court—in our opinion rightly—that the railway company were liable to a member of the public who had suffered injury by reason of their failure to repair a gate.

In the course of the argument, reference was more than once made to the Bridges Act, 1929, but no reliance was placed upon it, and rightly, for it has no application to the present case. It is unnecessary—and, being unnecessary, undesirable—that we should express any opinion upon the effect of an agreement under that Act between an owner and a local authority as to the maintenance of a bridge. It is possible to imagine cases, perhaps not very likely to arise in practice, in which a liability might be imposed upon a trading company in such circumstances that the company would, by transfer, be placed in the shoes of the local authority, with the result that it would be entitled to the exemption which originally enured for the benefit of the inhabitants. One or two such cases were suggested in the course of the argument. If ever they should arise in practice, they can be dealt with. Our judgment, of course, proceeds upon the facts in the present case, and, upon those facts, we hold, both on principle and on authority, that what has been called in SALMOND ON TORTS “this unsatisfactory exemption from liability” does not avail to cut down the responsibility of the defendants. We have thought it right, out of respect to the elaborate arguments which were addressed to us, to deal with this case in some detail, and to refer to some

of the many cases which were cited to us, and which we have considered. Upon the whole, our conclusion is that the judgment of HUMPHREYS, J., was correct, both in fact and in law, and this appeal is dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *H. L. Smedley*, Solicitor, Southern Railway (for the appellants); *Hancock & Willis*, agents for *Cecil Forward*, Axminster (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

GAUMONT BRITISH DISTRIBUTORS, LTD. v. HENRY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Lewis, JJ.), May 4, 5, 12, 1939.]

Copyright—Musical performance—"Knowingly makes any record . . . without the consent in writing of the performers"—*Interpretation*—*No written consent of each performer*—*Dramatic and Musical Performers' Protection Act, 1925 (c. 46), s. 1 (a).*

At a licensed dance-hall the appellants made a talking film record, afterwards shown in a newsreel at a cinema theatre, of a performance of a dance to the accompaniment of music played by S. and his band, of which the respondent was a member, having been engaged by S. by an oral agreement which related only to salary and the period of notice necessary to bring the agreement to an end. The respondent played in the band regularly. Written consent to produce the film was obtained by the appellants from the managing director of the company owning the dance-hall and the producer of the dance, but the respondent did not give his personal consent in writing. An information was thereupon preferred by the respondent, a trombonist, against the appellants, alleging that they knowingly made a record of a musical performance without the consent in writing of the performers, contrary to sect. 1 (a) of the Act of 1925. On the hearing of the information, evidence was given by the appellants' general manager that he did not know that he required the consent of each performer in writing, and it was proved that S. informed the manager of the dance-hall that he had seen the members of the band and that it would be quite in order for the film to be taken. The magistrate held that, as the respondent had not given his consent in writing as required by the Act, the appellants had committed a technical infringement, and he dismissed the information under the Probation of Offenders Act, 1907, and ordered the appellants to pay £15 15s. costs. Thereupon the present appeal was brought by the appellants, and during the hearing the divisional court sent the case back to the magistrate for him to find whether the appellants knew, at the time of making the record, that the consent in writing of the respondent had not been obtained. The magistrate's answer was that the appellants had never applied their minds to the question, because their general manager was ignorant of the requirements of the Act:—

HELD: (i) upon a proper construction of sect. 1 (a) of the Act of 1925, the word "knowingly" applied not only to the word "makes" but also to the words "without the consent in writing of the performers." Thus, it was only where what was done was done knowingly and also without consent that an offence was committed.

(ii) although not free from ambiguity, the magistrate's answer showed that it would not be correct to say that the appellants knowingly made the record without the consent of the respondent. It was an affirmative

finding that the minds of the appellants were free from knowledge of the absence of consent, and, on the magistrate's answer, the appellants were entitled to succeed.

[EDITORIAL NOTE. To prove the offence of knowingly making a record without the consent in writing of the performers, it is necessary to prove three things, (i) that the record was made, (ii) that there was no consent, and (iii) that the accused made the record "knowingly." The word "knowingly" does not imply that *mens rea* must be proved, but the only question to be answered is whether or not the accused knew, at the time the record was made, that the consent in writing of the performers had not been obtained.

AS TO REPRODUCTION WITHOUT CONSENT OF PERFORMER, see HALSBURY, Hailsham Edn., Vol. 7, pp. 599, 600, para. 925; and FOR CASES, see DIGEST, Vol. 14, pp. 33-38, Nos. 41-82.]

Cases referred to :

- (1) *Brooks v. Mason*, [1902] 2 K.B. 743; 14 Digest 38, 81; 72 L.J.K.B. 19; 88 L.T. 24.
- (2) *Sherras v. De Rutzen*, [1895] 1 Q.B. 918; 14 Digest 38, 80; 64 L.J.M.C. 218; 72 L.T. 839.
- (3) *Mousell Brothers v. London & North Western Ry.*, [1917] 2 K.B. 836; 14 Digest 44, 133; 87 L.J.K.B. 82; 118 L.T. 25.

APPEAL by way of case stated from a decision of a metropolitan police magistrate. The facts and the arguments are fully set out in the judgment of LORD HEWART, L.C.J.

Gilbert Beyfus, K.C., and *Harold Lightman* for the appellants.
K. E. Shelley, K.C., and *C. J. A. Doughty* for the respondent.

LORD HEWART, L.C.J. : This case came to be stated in the following circumstances. An information was preferred by the present respondent under the Dramatic and Musical Performers' Protection Act, 1925, s. 1 (a), against the present appellants, Gaumont British Distributors, Ltd., for that they on Nov. 15, 1938, at the Locarno, Streatham, did knowingly make a record of a musical performance without the consent in writing of the performers, contrary to the subsection already mentioned. The magistrate heard that information on Dec. 12, 1938, and on Jan. 2, 1939, he dismissed the information under the provisions of the Probation of Offenders Act, 1907, and ordered the present appellants to pay £15 15s. costs. It was because the appellants were not satisfied with that determination that they applied for and obtained a case stated, and that was the case which has been argued before us.

In stating the case, the magistrate made up his mind, as he was bound to make up his mind, with regard to certain findings of fact. He found that on Nov. 15, 1938, at the Locarno in Streatham, in the afternoon, the appellants did make a talking film record of a performance of a dance to the accompaniment of music played by one Douglas Swallow and his band. That talking film, the case finds, was shown on Nov. 21, 1938, as part of the Gaumont British news at a cinema in the Haymarket. The respondent, we are told, was a member of that band which played that music on that occasion, and the case finds as follows :

The respondent was engaged by the said Douglas Swallow as a member of the

said band in July, 1938, by an oral agreement, the only express terms of which were that the respondent was to receive a salary of £5 10s. per week, and the said contract was determinable by a fortnight's notice. The said band played music for dancing at the Locarno which is a licensed dance-hall. . . . The respondent played in the said band regularly.

The case next finds as follows :

The appellants obtained the consent in writing of Carl Lewis Heimann, managing director of Mecca Agency, Ltd. (the owner of the Locarno, Streatham, as well as the producer of the said dance) [meaning that the company called Mecca Agency, Ltd., was at the material time both the owner of the Locarno, Streatham, and the producer of the dance], to the production of the said sound film by letters dated Nov. 14 and Nov. 15, 1938. A

Some observations have been made on whether or not those letters were admissible. They were in fact admitted. They are set out in the case, and I do not think it is useful to consider further whether or not they ought to have been admitted. In the letter of Nov. 14, Mr. Heimann writes to Mr. Bromige of the Gaumont British news confirming a telephone conversation and saying that a Mr. Crocker will be glad to meet Mr. Bromige and the electrician at the Locarno Dance Hall on Tuesday, Nov. 15, at 10 a.m. The letter continues as follows : B

The demonstrators will be ready for you at 6 p.m. and it will be convenient for you to take the film of the crowds at 10 p.m. The only publicity we are asking in the matter is that you should [make an announcement in a certain form] C

There followed a letter, dated Nov. 15, again in its terms following a telephone conversation, in the following terms : D

It will be quite in order to delete [a certain name] . . . we leave the titles entirely to your discretion.

So far, the magistrate has been finding facts which were proved in evidence, or admitted before him, and his findings continue by referring to a written contract of Sept. 23, 1937, made between the Mecca Agency, Ltd., and a Mr. Douglas Swallow. That contract contains certain terms which are set out in the case—namely, the band was to play for dances, concerts, films, broadcasting, or in any other capacity in which music was required and as the management might at their discretion determine. Then it says that the band is to conform to certain conditions contained in the appendix, and the band leader agrees by the contract that he acts in the capacity of a contractor, that he contracts to supply the services of himself and his musicians, and further, that those musicians are in his, the band leader's, employ. By another term in the contract it was agreed that all moneys received for the services of the band during the currency of the agreement should accrue to the management entirely, but, in respect of fees or emoluments received from broadcasting, television, recording, and so on, any profits should be divisible, as to 50 per cent. to the management and as to 50 per cent. to the band. Then the case finds as a fact as follows : E

The respondent did not give his personal consent in writing to the making of the said sound film. F

Evidence was given by Harold Thomas Bromige, general manager of Gaumont British news, that he left everything to be arranged by the said Carl Lewis Heimann G

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and thought everything necessary had been arranged when he sent the cameraman to film the said performance. He further stated that he did not know he required the consent of each performer in writing and that the appellants' only direct consents were contained in the letters referred to above, and that there was no consent in writing for the taking of the band's performance. Evidence was given by Carl Lewis Heimann, the managing director of the company controlling the Locarno, Streatham, that he left all the arrangements for the production of the sound film of The Chestnut Tree to be arranged by one Mr. Crocker, his general manager.

The case goes on to find that Mr. Swallow informed a Mr. Chaperlin, the manager of the Locarno, Streatham, on Nov. 14, 1938, as follows :

... he had seen the members of the band and ... it would be quite in order for the film to be taken.

B Then it finds as follows :

The respondent knew immediately before the commencement of the recording and filming of the said sound film of the intention to make the said sound film and did not protest. He stated he was on the job when he was first aware that a record was to be taken at 6 p.m. He saw the microphone and the band commenced to play shortly after 6 p.m. He stated that he objected as soon as he came off, and later to his union.

C Then follow the contentions on either side :

On the part of the appellants it was contended that the consent in writing required by the Dramatic and Musical Performers' Protection Act, 1925, need not be signed by each performer personally. That such consent in writing may be given by a duly authorised agent. That by the respondent's service agreement with the said Douglas Swallow the latter was duly authorised to give any necessary consent in writing for the production of the said sound film.

Finally it was contended that the written contract between the Mecca Agency, Ltd., and Mr. Swallow constituted a sufficient consent in writing by Mr. Swallow on behalf of the respondent and/or that the two letters to which reference has already been made from Mr. Heimann to the appellants were a sufficient consent in writing. There followed the contention, which was the opposite of the contention which had been raised on the part of the respondent, with regard to the difficult, and sometimes quite superfluous, question of *mens rea*.

F The magistrate, having had the evidence and the documents before him, formed his conclusion, which is headed in the case stated with the word "Opinion." He was of the following opinion :

That the respondent had not given his consent in writing as required by the Act.

Secondly, he was of the following opinion :

G That such consent in writing required by the said Act may be given by a duly authorised agent of the performer.

In other words, a contention that each individual performer must separately give his consent was found to be incorrect. A duly authorised agent might give his consent. The magistrate further expressed the opinion that Mr. Swallow

H ... had by the said contract dated Sept. 23, 1937, given his consent in writing as required by the Act in respect of his own performance.

Moreover, he said that there was no evidence before him upon which he could hold that Mr. Swallow was the duly authorised agent of the

respondent. To pause there for a moment, it seems to me to be quite clear that the magistrate was entitled to find that the respondent had not given his consent in writing as required by the Act. I think that it is quite clear also that he was entitled to find upon these materials that there was no evidence on which he could properly hold that Mr. Swallow was the duly authorised agent of the respondent. He goes on to find **A** as follows :

. . . there has been an entire absence of *mens rea* on the part of the appellants . . . *mens rea* is not an essential ingredient in the offence.

It was in those circumstances, and after considering those findings, that we thought it right to remit to the magistrate a further question of what appeared to us to be a precise kind. Before I turn to that question, I desire to look for a moment or two at the provisions of this part of the Act. The Dramatic and Musical Performers' Protection Act, 1925, s. 1, provides as follows :

If any person knowingly (*a*) makes any record, directly or indirectly, from or by means of the performance of any dramatic or musical work without the consent in writing of the performers . . . he shall be guilty of an offence under this Act, and shall be liable [to certain penalties]. **C**

A good deal of the controversy before us has turned, and very naturally so, upon the true construction of the words :

If any person knowingly (*a*) makes any record . . . without the consent in writing of the performers . . . he shall be guilty of an offence. . . . **D**

Our attention was directed to various cases upon which I need not linger. A useful case on the whole kind of topic is *Brooks v. Mason* (1). There the word "knowingly" was carefully considered in relation to a charge against the holder of a licence. The Intoxicating Liquors (Sale to Children) Act, 1901, s. 2, provided as follows : **E**

Every holder of a licence who knowingly sells or delivers . . . save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of 14 years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels [in the prescribed manner], shall be liable to [certain penalties]. **F**

It was held in that case as follows :

. . . that the holder of a licence, who had delivered intoxicating liquor to a child under 14 in a vessel not corked and sealed as the Act required, was guilty of an offence under sect. 2, although he honestly believed when he delivered the liquor that the vessel was so corked and sealed. **G**

There LORD ALVERSTONE, C.J., who heard that case with WILLS and CHANNELL, JJ., all three judges agreeing in the result, though CHANNELL, J., thought that the point was somewhat doubtful, said, at p. 747 :

I am of opinion, although not without doubt, that it would be altering the language of the statute, and departing from its intention, to read the word "knowingly" into the exception. The effect would be to say that a defendant need only prove by way of defence that he believed the vessel to be secured as the Act directs, although in fact it was not so secured. I think the Act only intended to except intoxicating liquors sold or delivered in vessels which were in fact properly sealed and secured. The exception specifies matters of defence which, if proved in fact, would negative the allegation that an offence had been committed. **H**

- That case, I think, throws light upon the true interpretation of this section, and, in my opinion, the word “~~k~~nowingly” in this section, framed as it is, applies, not only to the words “makes any record,” but also to the following words: “without the consent in writing of the performer.” In other words, a part, and a necessary part, of the definition of an offence is that there shall not be the consent in writing of the performers. It is only where the two conditions are fulfilled—namely, where that which is done is done knowingly and is also done without the consent in writing of the performers—that the offence is committed. However, that is very far from dealing with the whole difficulty. I am not suggesting for a moment that in a case like this the difficult topic of *mens rea* comes in. There are numerous well-known cases on the topic of *mens rea*. It is usual in such cases to refer in particular to the well-known case of *Sherras v. De Rutzen* (2) and to *Mousell Brothers v. London & North Western Ry.* (3), but, when one finds put up as a danger signal or a signpost at the very forefront of the first section of this statute the words “If any person knowingly” does certain things, it seems to me that discussions about *mens rea* are of something less than academic interest. The knowledge on the part of the alleged offender is described prominently as an essential ingredient of the offence. The other essential ingredient of this offence is that that which the offender does must be knowingly done without the consent in writing of the performers. The knowledge which is a part of the constitution of the offence extends to knowledge of the absence of consent on the part of the performers.

- Taking that view of the true meaning of this section, we thought it right after the hearing on the former occasion to request the magistrate to communicate to us the answer to the plain question which was then submitted to him in writing. That question was as follows:

Whether the appellants knew at the time of the making of the record that the consent in writing of the performers had not been obtained.

- The answer, which was given in writing and is now before me, was as follows:

The defendants never applied their minds to the question whether the consent in writing of the performers had or had not been given because the responsible manager, Mr. Bromige, was ignorant of the requirements of the Act.

- With all due respect to the magistrate who has answered that question, I am bound to say that I have known answers more explicit in their terms, more free from ambiguity. One unambiguous way of answering this question would have been by means of the monosyllable “Yes” or the monosyllable “No,” but, when one looks at this answer, it becomes doubtful what exactly in relation to the question it must be taken to convey. We have had, and I think quite naturally had, a considerable amount of controversy upon the true interpretation of what we hoped was going to prove a plain answer to a simple question, and even now we are left to consider what exactly it is which the magistrate has expressed. In my opinion, the answer which the magistrate has written out shows

that it would not be correct to say in this case that the appellants knowingly made a record without the consent in writing of the performer. The answer seems to be that they did not know that there was absence of consent. They did not apply their minds to the question whether or not it had been given. The answer seems to be of the nature of an affirmative finding that the minds of the appellants were free from the knowledge that there was an absence of consent. At any rate, the magistrate manifestly refrains from finding that the appellants did know, at the time of the making of the record, that the consent in writing had not been obtained. **A**

On that question and that answer viewed in relation to the rest of the case—because the rest of the case is relevant to this remaining part of the controversy—I think that the proper conclusion is that the finding is in favour of the appellants. I hasten to add, and I desire to add emphatically, that no colour can be obtained from this case, or from the argument in this case, or from any opinion which is present to my mind, that the wholesome and fundamental principle *ignorantia juris neminem excusat* is in any degree or in any sense to be modified or departed from. It has not for a moment been suggested by counsel for the appellants that the appellants are to put forward, or to derive any benefit from, a contention that, being ignorant of the law, they were therefore excused. That is not his argument at all. His argument is that it is an essential part of the case for the prosecution that the appellants did that which they did knowingly without the consent in writing of the performers. He has argued that the effort to establish that proof broke down. I should be very sorry even to appear, directly or indirectly, to add any colour to the suggestion, if it were made, as I do not think it is, that, in circumstances of this kind, ignorance of the law might excuse. The way in which the topic of the appellants' knowledge came in was solely with reference to these words "knowingly without the consent in writing of the performers," and the contention was a contention of fact. According to a true view of the evidence of fact in this case, it was incorrect to say that the appellants did knowingly without the consent in writing of the performers do that which was done. I regret that this question of fact was not more simply and clearly answered and disposed of, but we must take the answer which the magistrate has given in the form in which it is given, and it seems to me that, on a fair construction of that answer, there is an affirmative finding that the minds of the appellants were free from the knowledge that there was an absence of consent. That being so, I think that this appeal ought to succeed, and that the order for the payment of costs by the appellants ought to be quashed. **B** **C** **D** **E** **F** **G** **H**

HUMPHREYS, J.: In my opinion, the decision of the court in this case must turn upon the answer to the main contention which was argued before us on the original hearing of this appeal. The offence

charged being an offence under the Dramatic and Musical Performers' Protection Act, 1925, s. 1 (a), it was contended by counsel for the respondent that the word "knowingly," which, in appearance, at all events, applies to three subsections, as a matter of construction ought to be held to apply to subsects. (b) and (c), and only to part of subsect. (a).

A Sect. 1 provides as follows :

If any person knowingly (a) makes any record . . . without the consent in writing of the performers ; or (b) sells or lets for hire, or distributes for the purposes of trade . . . any record made in contravention of this Act ; or (c) uses for the purpose of a public performance any record made in contravention of this Act . . .

- B In my opinion, that contention is one to which it is impossible to give effect. I cannot for my own part imagine why, if the legislature intended that the word "knowingly" should apply to subsects. (b) and (c) and not to subsect. (a), they did not say so. Nothing could have been simpler than to make it an offence for any person to make a record without the consent in writing of the performers, and then make it an offence for any person knowingly to sell, or let for hire, or to use for the purpose of a public performance, a record made in contravention of the Act. In my opinion, and I confess I have no doubt whatever about the matter, it is clear that the offence created by sect. 1 (a) is the offence of knowingly making a record, knowing that the consent in writing of the performers has not been obtained. In other words, "knowingly" applies both to the making of the record, as contended for by counsel for the respondent, and to the absence of consent by the performers, as counsel for the respondent contended that it does not.
- E That view of the construction of the section involves the further proposition that the onus of proof that the accused person did know both that he was making a record and that he was making it without the consent in writing of the performers lies upon the prosecution. So much is clear from the decision of this court in the well-known and frequently referred to case of *Sherras v. De Rutzen* (2). • That was a case in which a licensed victualler had been prosecuted under the terms of the Licensing Act, 1872, s. 16. In that section, there are two subsections. Subsect. (1) provides that a licensed person shall be guilty of an offence if he knowingly harbours or knowingly suffers to remain on his premises a constable in fact on duty. Subsect. (2) creates an offence in the following terms :
- G [If any licensed person] supplies any liquor . . . to any constable on duty . . .
- F There the word "knowingly" is omitted. The judgment of DAY, J., which was concurred in by the only other member of the court, WRIGHT, J., contains the following statement of the law, at p. 921 :
- H An argument has been based on the appearance of the word "knowingly" in sect. 16 (1), and its omission in subsect. (2). In my opinion the only effect of this is to shift the burden of proof. In cases under subsect. (1) it is for the prosecution to prove the knowledge, while in cases under subsect. (2) the defendant has to prove that he did not know.

If the argument of counsel for the respondent on what I have described as the main bone of contention in this case had been right, it would have

been a matter for the magistrate to consider, first of all, whether the offence created by this section was one to which the doctrine of *mens rea* applied at all, and, in considering that, he would have had to consider the general proposition laid down in *Sherras v. De Rutzen* (2) stated at the commencement of the judgment of WRIGHT, J., at p. 921 :

There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence ; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter [of the offence].

Assuming that he came to the conclusion that *mens rea* was an ingredient of the offence, it would then have been right for him to consider it from the point of view that it was open to the defendant to prove that he had no knowledge of the wrongful act done. However, as soon as it is established—as, in my view, it is established—that the section laid upon the prosecution the onus of proof that the act was done knowingly, *mens rea* becomes quite an inapplicable expression to use in regard to the case at all. The only question remaining to be considered in a prosecution under this section, it having been proved that a record was in fact made, and in fact made without the consent of the performers, is whether or not it is proved by the prosecution that the defendant did that act knowingly. That question is, in my opinion, entirely a question of fact for the magistrate, and I should be sorry to say anything which might indicate that in my view separate evidence has to be given of the knowledge of the defendant in such a case, apart from what may be called the general facts of the case, which prove that he has in fact made a record without the consent of the performers. The facts might be such—they may have been such in this case, I do not know—as to justify the magistrate in coming to the conclusion that the accused person did know that he was making the record without the consent of the performers. However, whatever the facts are, the facts must be interpreted by the magistrate, and it is for him to find as a fact whether or not the defendant knew. It was because the magistrate had used the expression *mens rea*, which is quite irrelevant to this case, and had merely found on this part of the case that there was an entire absence of *mens rea* on the part of the appellants, and had also said that *mens rea*, in his opinion, was not an essential ingredient in the offence, but had not dealt with the question of whether or not the appellants were shown to have done the act knowingly, that this court sent the matter back to him, as my Lord said, with the perfectly simple plain question to which we desired an answer—namely, whether or not the appellants knew, at the time of the making of the record, that the consent in writing of the performers had not been obtained. I echo and share the regret expressed by my Lord that the magistrate has not found it possible to answer that question Yes or No. It appears that he was assisted in coming to a conclusion by counsel on each side, and he has apparently adopted some formula suggested by counsel for the respondent. Whether it is owing

to that or owing to something else, the fact remains that he has given us an answer which, to my mind—and I am only speaking for myself—fails to convey what was his opinion upon that perfectly simple question of fact. I entirely agree with my Lord that, it being established that the onus is on the prosecution to prove absence of consent, the magistrate has, I think, carefully refrained from giving the answer which would be the only answer which would justify us in saying that this offence had been committed—namely, the answer, “Yes, they did know.” I do not desire to repeat what my Lord has said. I agree precisely with the language which has been used in his judgment as to the true interpretation of that rather complicated answer of the magistrate, and the result is that, in my opinion, it has been proved in this case that the appellants did make a record. It has been proved that they did make it without the consent in writing of the performers, as required by the statute, but there has been a failure to prove that they did that knowingly. For those reasons, I concur in the result of this appeal proposed by my Lord.

LEWIS, J. : I agree, for the same reasons.

Appeal allowed with costs. Magistrate's order quashed.

Solicitors : *M. A. Jacobs & Sons* (for the appellants) ; *Hall, Brydon & Chapman* (for the respondent).

[*Reported by* MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

E NOBLE v. SOUTHERN RAILWAY CO.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Macnaghten, J.), April 27, 28, May 15, 1939.]

Workmen's Compensation—Accident arising out of employment—Railway employee killed while walking along line—Forbidden route—Whether act done for purposes of employers' business—Workmen's Compensation Act, 1925 (c. 84), s. 1.

The deceased, a fireman employed by the respondents, was ordered to proceed from an engine-shed to a railway station. The permitted route for this journey did not involve walking along the railway lines, and several warnings had been issued by the respondents to their staff forbidding them to walk along the lines unless they were required so to do in the execution of their duty or unless they were using a permitted route. The deceased proceeded to walk along the lines and was killed by a train :—

HELD : (i) following *Clarke v. Southern Railway Co.* (2), the deceased had gone outside the sphere of his employment, and his widow was not entitled to recover compensation.

(ii) the decision in *Clarke v. Southern Railway Co.* (2) cannot be considered as having been impliedly overruled either by *Thomas v. Ocean Coal Co., Ltd.*, (3) or by *Harris v. Associated Portland Cement Manufacturers, Ltd.* (4).

[EDITORIAL NOTE. Some members of the court in this case took the view that, if they had not felt themselves bound by the decision in *Clarke v. Southern Ry. Co.* (2), but had been construing the relevant statutory provisions for the first time,

they would have come to the opposite conclusion. It was contended that *Clarke's* case (2) had been impliedly overruled by recent decisions in the House of Lords, and, although the court did not adopt that view, this aspect will probably in due course receive the consideration of the House of Lords, since leave to appeal was granted.

AS TO FORBIDDEN MODE OF TRANSIT, see DIGEST, Vol. 34, pp. 299-301, Nos. 2487-2497. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 74-83.] A

Cases referred to :

- (1) *Knowles v. Southern Ry. Co.*, [1937] A.C. 463 ; [1937] 2 All E.R. 403 ; Digest Supp. ; 106 L.J.K.B. 339 ; 156 L.T. 461 ; 30 B.W.C.C. 76.
- (2) *Clarke v. Southern Ry. Co.* (1927), 96 L.J.K.B. 572 ; Digest Supp. ; 137 L.T. 200 ; 20 B.W.C.C. 309. B
- (3) *Thomas v. Ocean Coal Co., Ltd.*, [1933] A.C. 100 ; Digest Supp. ; 102 L.J.K.B. 142 ; 148 L.T. 219 ; 25 B.W.C.C. 436.
- (4) *Harris v. Associated Portland Cement Manufacturers, Ltd.*, [1939] A.C. 71 ; [1938] 4 All E.R. 831 ; Digest Supp. ; 108 L.J.K.B. 145 ; 160 L.T. 187 ; 31 B.W.C.C. 434. C
- (5) *Stokoe v. Mickley Coal Co., Ltd.* (1928), 138 L.T. 566 ; Digest Supp. ; 21 B.W.C.C. 70.
- (6) *Victoria Spinning Co. (Rochdale), Ltd. v. Matthews*, [1936] 2 All E.R. 1359 ; Digest Supp. ; 105 L.J.K.B. 521 ; 155 L.T. 363 ; 29 B.W.C.C. 242.
- (7) *Privett v. Darracq Motor Engineering Co., Ltd.* (1934), 151 L.T. 211 ; Digest Supp. ; 27 B.W.C.C. 163. D
- (8) *Evans v. Powell Duffryn Associated Collieries, Ltd.* (1938), 31 B.W.C.C. 229.
- (9) *Davies v. Gwauncaegurwen Colliery*, [1924] 2 K.B. 651 ; 34 Digest 313, 2572 ; 94 L.J.K.B. 229 ; 132 L.T. 221 ; 17 B.W.C.C. 181.
- (10) *Goring v. Southern Ry. Co.* (1938), 31 B.W.C.C. 68 ; Digest Supp.
- (11) *Wilsons & Clyde Coal Co. v. M'Ferrin, Kerr v. Dunlop (James) & Co.*, [1926] A.C. 377 ; 34 Digest 301, 2499 ; 95 L.J.P.C. 130 ; 135 L.T. 164 ; 19 B.W.C.C. 1 ; affg. S.C. sub nom. *McFerrin v. Wilsons & Clyde Coal Co., Ltd.*, *M'Aulay v. Dunlop (James) & Co., Ltd.*, 18 B.W.C.C. 630, 680. E
- (12) *Shephard v. London, Midland & Scottish Ry.* (1930), 143 L.T. 220 ; Digest Supp. ; 23 B.W.C.C. 105.
- (13) *Howells v. Great Western Ry. Co.* (1928), 97 L.J.K.B. 183 ; Digest Supp. ; 138 L.T. 544 ; 21 B.W.C.C. 18. F
- (14) *Anderson v. Hickman (H.) & Co., Ltd.* (1928), 21 B.W.C.C. 369 ; Digest Supp.
- (15) *St. Helens Colliery Co., Ltd. v. Hewitson*, [1924] A.C. 59 ; 34 Digest 280, 2364 ; 93 L.J.K.B. 177 ; 130 L.T. 291 ; 16 B.W.C.C. 230.

APPEAL from a decision of His Honour JUDGE SIR GERALD HURST, K.C., at the Croydon County Court, dated Mar. 17, 1939. The facts are fully set out in the judgments. G

F. W. Beney for the appellant.

A. T. Denning, K.C., and *W. H. Duckworth* for the respondents.

Beney : If an act done by a workman is prohibited by a regulation but is still in the course of his duty, then he can recover. The question, then, is whether or not the act was done for the purposes of the employers' trade or business : *Stokoe v. Mickley Coal Co., Ltd.* (5). [Counsel referred to *Victoria Spinning Co. (Rochdale), Ltd. v. Matthews* (6) and *Privett v. Darracq Motor Engineering Co., Ltd.* (7).] It was only the prohibition that made this act an improper one. Apart from that, it H

was obviously an act within the scope of the man's employment. The facts here showed conclusively that this act was done by the deceased in order to get to the station. He was accustomed to wandering about railway lines in the course of his duty as a driver. The judge thought that, because the man was where he should not have been, he could only have been there for his own purposes. That is not so. The judge failed to bear in mind *Evans v. Powell Duffryn Associated Collieries, Ltd.* (8). [Counsel referred to *Harris v. Associated Portland Cement Manufacturers, Ltd.* (4), *Thomas v. Ocean Coal Co., Ltd.* (3), *Davies v. Gwauncaegurwen Colliery* (9), *Knowles v. Southern Ry. Co.* (1) and *Goring v. Southern Ry. Co.* (10).] *Clarke v. Southern Ry. Co.* (2) was wrongly decided. Also, in that case the man's conduct could be said to have been reckless. The judge said that the test was the man's motive. That is entirely irrelevant. The judge clearly misdirected himself.

- Denning, K.C.*: This man was a fireman, and his job was on the footplate, not on the permanent way, and certainly not on an electrified suburban line, a most dangerous place. There was a safe route for his journey from the shed to the station, and it was no part of his employment to go by a different route. Prior to 1923, there were two principal ways by which a man might take himself out of his employment, (i) by doing an act different in kind from anything he was authorised to do, and (ii) by doing an act which, though not different in kind, had been put outside the range of his employment by a general prohibition of such a nature as to limit the sphere of employment. The effect of sect. 1 (2) is that, in the latter case, the workman, notwithstanding the prohibition, is deemed to be within his employment if the act was done for the purposes of the employment. The former case is left untouched, and an act different in kind is still outside the employment. It may be that there is still a prohibition as well, but a prohibition does not bring within the employment an act which would otherwise be outside it: *Goring v. Southern Ry. Co.* (10). In regard to taking a route, if a man abrogates to himself a right to take a route which involves taking risks different in kind from any which he is authorised to take, then he is outside his employment. The effect of the prohibition is merely to keep outside something which was already outside. Assuming, however, that the act was not one different in kind, it is then necessary to consider whether the taking of a route is an act only incidental to the employment. Then, if the man takes a dangerous route, and involves himself in a needless risk to save himself trouble, that is not an act done for the purposes of or in connection with his employment. *Wilsons & Clyde Coal Co. v. M'Ferrin* (11) and *Thomas v. Ocean Coal Co., Ltd.* (3) show the scope of sect. 1 (2). *Clarke v. Southern Ry. Co.* (2) is completely decisive of this case. That case has never been doubted. It was cited in the House of Lords, but was not dissented from. In *Shephard v. London, Midland & Scottish Ry.* (12), although the workman there was going to his work, the nature of the act—namely, walking along the line—was such that

he could not recover. [Counsel referred to *Harris v. Associated Portland Cement Manufacturers, Ltd.* (4).] It is necessary to consider what a man is employed and authorised to do, and whether what he is doing is one series of operations. In *Evans v. Powell Duffryn Associated Collieries, Ltd.* (8), there was an emergency, and that distinguishes that case from this. A dangerous route is outside the employment unless it is a permitted A or a tolerated route : *Howells v. Great Western Ry. Co.* (13) and *Anderson v. H. Hickman & Co., Ltd.* (14). However, assuming that *Clarke v. Southern Ry. Co.* (2) was wrongfully decided, there is still the question of whether this case is under sect. 1 (2) at all. On the authorities, the words "upon or in connection with" have nothing to do with incidental acts. The B question is as to what is incidental and what is not, and that is a very fine distinction. [Counsel referred to *St. Helens Colliery Co., Ltd. v. Hewitson* (15), *Davies v. Gwauncaegurwen Colliery* (9), *Knowles v. Southern Ry. Co.* (1) and *Stokoe v. Mickley Coal Co., Ltd.* (5).] This man was involving himself in a needless peril for his own purposes. That C is not an act done in connection with his employment, and he is not covered by sect. 1 (2).

Beney, in reply : In *Davies v. Gwauncaegurwen Colliery* (9) and *St. Helens Colliery Co., Ltd. v. Hewitson* (15), the acts held to be incidental were of a totally different character. The foundation of the decision D in *Clarke v. Southern Ry. Co.* (2) was that, to be within sect. 1 (2), a case must first be within sect. 1 (1). That has since been shown to be wrong. [Counsel referred to *Shephard v. London, Midland & Scottish Ry.* (12) and *Evans v. Powell Duffryn Associated Collieries, Ltd.* (8).] E

MACKINNON, L.J. : The deceased was a fireman in the employ of the Southern Railway Co. On Aug. 25, 1938, he was on duty at their Norwood Junction station. He reported at the engine-shed, and received instructions to proceed to the platforms of the passenger station and there board a train to carry him to East Croydon station, where he was F to do his night's work. The specified route by which he should have gone from the engine-shed to the station was to go along a footpath for some 400 ft., then turn left at right angles across one set of rails, climb the stairs of a footbridge which crossed the down electric line, descend the corresponding stairs, and so emerge on a footpath which, G in another 400 ft., led to the public highway, Penge Road. The route to the station would then be along Penge Road, across a bridge carried over all the lines, and by High Street, Portland Road, and yet another footpath to the main entrance of the station. The man started along this specified and proper route, but, when he got to the stairs of the H footbridge, he did not ascend them. He walked on towards the station on the west side of the lines of rails, under the retaining wall on that west side. While so proceeding towards the station, he was knocked down and killed by an electric train coming from behind him.

Before he left the engine-shed, the deceased was well aware of three

admonitions which had been given to him, and to all his fellow-workmen, by the employers. The railway company had published and conspicuously displayed a notice headed: "Warning to staff." The first paragraph of this was as follows:

A Staff must not use the line or railway or the company's property when proceeding to or leaving their work unless there is no other possible route. Staff working at engine-sheds . . . are warned against . . . walking on the lines more than is absolutely necessary.

There had also been issued on July 5, 1935, a notice in the following terms:

B Notice to all concerned, Norwood Junction Locomotive Depot. Enginemen and others must note that the route to be taken is from the up side of the station via company's footpath, causeway, Portland Road, South Norwood High Street, Goat House Bridge, Penge Road.

This specifies, in the reverse direction, the route I described above.

C Finally on June 1, 1938, a circular was issued, headed "Staff walking along and crossing lines," calling attention to r. 15, which was printed in the following terms:

D Employees are expressly prohibited from walking upon the line or crossing the rails . . . unless they are required to do so in the execution of their duty or are proceeding to or from their work by a route permitted by the company. Any employee walking upon the line or crossing the rails, excepted as aforesaid, will be acting outside his employment.

E There can be no doubt that, when Noble was killed, he had departed from the route he was expressly ordered by his employers to take, and he was in a place where they had expressly forbidden him to go. The present claim was made by his widow under the Workmen's Compensation Act. The answer of the employers was as follows:

. . . the death of the said Thomas Noble was not caused by accident arising out of and in the course of his employment.

F The judge has upheld this contention, and has dismissed the claim. The widow appeals. Sect. 1 (1) of the Act of 1925 provides as follows:

If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . pay compensation . . .

Sect. 1 (2) provides as follows:

G . . . an accident resulting in the death . . . of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention . . . of any orders given by or on behalf of his employer . . . if such act was done by the workman for the purposes of and in connection with his employer's trade or business.

H If by some happy catastrophe the vast mass of reported cases had been wholly destroyed, and I could approach this as a question of the construction of these sections, I should be of opinion that this appeal should succeed. The man had entered upon his duties at the engine-shed. He was ordered to go to the station and there board a train. He was proceeding to the station in order to do that. His walking

was, I think, an act done for the purposes of and in connection with his employer's business. It is true that he selected a forbidden route, and clearly, when the accident happened, he was "acting in contravention of orders given by his employers," but subsect. (2) says that none the less the accident shall be "deemed to arise out of and in the course of his employment" provided only that his act was done "for the purposes of and in connection with the employer's business." Therefore, I think that the sole question in this case, properly understood, is whether this man, when walking along the line, was doing an act for the purposes of and in connection with the railway company's business. Unaided by authority, I should think that the answer should be in the affirmative. He was proceeding upon his immediately allotted task—namely, to proceed from the engine-shed to the station. He deviated from the directed route, but that was not to fulfil any purpose of his own—for example, as in *Knowles v. Southern Ry. Co.* (1), to proceed to a public-house and get a drink. So far as there was any evidence, he had, when walking as he was, only one purpose—to transport himself to the station. He was doing what he was told to do, and nothing else. In the manner of doing it, he flatly disobeyed orders, but, under subsect. (2), that does not debar a claim by his dependants upon his death. A B C

In the absence of any authority, therefore, I should allow this appeal. However, there is a mass of authority, and in particular, there is the decision of this court in *Clarke v. Southern Ry. Co.* (2). The facts of that case seem to me to be precisely the same as those in this one, and I cannot see that it is in any way possible to distinguish them. The authority of *Clarke's* case (2) does not appear to have been challenged in any subsequent case, either in this court or in the House of Lords, and it was followed by the county court judge. D E

It was argued on behalf of the appellant that the decision is no longer binding on this court because it has been overruled by implication by two recent cases in the House of Lords subsequent to it. The two cases relied on are *Thomas v. Ocean Coal Co., Ltd.* (3) and *Harris v. Associated Portland Cement Manufacturers, Ltd.* (4). In neither of these cases was any reference made to *Clarke's* case (2). It is true that there are to be found in the opinion of LORD HANWORTH, M.R., in *Clarke's* case (2) certain passages which appear to be contrary to what is laid down in *Thomas's* case (3) and *Harris's* case (4), but the same criticism cannot be applied to the judgment of SCRUTTON, L.J. In these circumstances, paying proper deference to the decision of this court in *Clarke's* case (2), I think that this appeal must be dismissed with costs. If leave to appeal to the House of Lords is asked, I think that it should be granted. F G H

LUXMOORE, L.J. : I have had the privilege of reading the judgment which MACKINNON, L.J., has just read, and I have not thought it necessary to write a separate judgment, because I have found myself in complete agreement with his judgment.

MACNAGHTEN, J.: I also think that the present case is covered by the decision of this court in *Clarke v. Southern Ry. Co.* (2), and that there is no sufficient ground for holding that that decision has been impliedly overruled by later decisions of the House of Lords. I therefore agree that the appeal must be dismissed. Even if this case could be distinguished from *Clarke's* case (2), however, I venture to think that Mrs. Noble's claim for compensation in respect of the death of her husband could not be sustained. Her claim for compensation on behalf of herself and her infant son is based on the provisions of the Workmen's Compensation Act, 1925, s. 1 (2). The relevant words of that subsection are as follow :

For the purposes of this Act an accident resulting in the death . . . of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of . . . any orders given by or on behalf of his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business.

Thomas Noble was a "passed fireman" in the employment of the Southern Railway Co., and he was killed by a passing train in the early morning on Aug. 25, 1938, while he was walking on the permanent way from the engine-shed at Norwood Junction to Norwood station. He had reported for duty at the engine-shed shortly before midnight, and had then received instructions to take the train leaving Norwood Junction station at 12.25 a.m. for East Croydon. It was his duty to go from the engine-shed to the station by a specified route. It was, as he well knew, contrary to the express orders of the company to go along the permanent way. The authorised route was 161 yds. longer than the forbidden route, and, whereas the forbidden route was level all the way, the authorised route passed over the footbridge erected over the electrified line from the Crystal Palace. Noble left the engine-shed by the authorised route, but, when he came to the footbridge, instead of going over it, he turned aside, and, in contravention of his orders, proceeded along the permanent way towards the station. He had hardly gone a hundred yards from the footbridge when he was knocked down and killed by a passing train.

In order to establish her claim, it would be necessary for the applicant to prove that the act done by her husband in contravention of his orders—namely, his choice of the forbidden route—was an "act" done by him for some purpose of the company. Since, by reason of his death, no direct evidence of the purpose which he had in mind is available, the question whether or not the act was done "for the purposes of and in connection with his employer's trade or business" must needs depend on the inference to be drawn from the proved facts. It was submitted on behalf of the applicant that the proper inference to be drawn from this fact was that Noble took the forbidden route because he was short of time, and that his choice of that route was an act done in an emergency in the interests of the company. The county court judge, however,

rejected that view. He held that Noble would have had plenty of time to catch the train if he had taken the authorised route, and that there was no emergency which explained or justified his act. As I read his judgment, the county court judge held that, on the facts proved before him, the applicant failed to establish that Noble went along the permanent way where he was killed for any purpose of the company, and that he was, therefore, bound to dismiss the applicant's claim for compensation.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *Kenneth Brown, Baker, Baker* (for the appellant); *H. L. Smedley*, Solicitor, Southern Railway, (for the respondents).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

CRESSWELL AND CRESSWELL v. LIVERPOOL CORPORATION.

[LIVERPOOL SPRING ASSIZES (Hallett, J.), **May 3, 1939.**]

Poor Law—Relief—Duty to grant relief—Enforcement—Public assistance committee—Recommendation of medical officer—How far binding on committee—Discretion of committee—Poor Law Act, 1930 (c. 17), s. 15 (1)—Public Assistance Order, 1930 (S.R. & O., 1930, No. 185), reg. 167—Relief Regulation Order, 1930 (S.R. & O., 1930, No. 186), reg. 10.

The female plaintiff had, with the financial assistance of the public assistance committee, had her teeth extracted. She then applied to the committee to provide her with false teeth, and the district medical officer recommended that she should be so provided. That recommendation was in turn duly approved by the dental consultant. The committee considered that application and refused it, and their refusal was confirmed by the defendant corporation. She then brought this action, alleging, *inter alia*, that such refusal was a breach of statutory duty :—

HELD : (i) the recommendation of the district medical officer, even if approved by the consultant, did not bind the public assistance committee to provide the artificial teeth at the public expense.

(ii) the public assistance committee had a discretion to refuse such an application, and in exercising such discretion they must have regard to (i) both the medical and financial need of the applicant, and (ii) the general expense of such relief to the corporation. It would be wrong, however, for them to lay down specific rules—for example, that men over 55 years of age should never be granted free treatment.

Semble : an action for damages does not lie against a poor law authority for failure to grant relief. The proper remedy is an action for an order of *mandamus*.

[EDITORIAL NOTE.] The judgment herein includes a full consideration of the duties of a public assistance committee in respect of medical relief. It may very well be that much that is said must be treated as *obiter*, but, as there is no other authority at the present time on these matters of everyday occurrence throughout the country, the importance of the present judgment is obvious. The local authority, it would appear, are entitled, quite apart from the merits and necessities of any particular case, to take into account the general expense to which they are being put in respect of relief of that kind.

AS TO DUTY TO GRANT RELIEF, see HALSBURY, Hailsham Edn., Vol. 25, pp. 384, 385, para. 663; and FOR CASES, see DIGEST, Vol. 37, pp. 226, 227, Nos. 182-198.]

Cases referred to :

- (1) *Jack v. Isdale* (1866), L.R. 1 Sc. & Div. 1 ; 37 Digest 226, case 182ix.
- (2) *Duncan v. Aberdeen County Council*, [1936] 2 All E.R. 911 ; Digest Supp. ; 106 L.J.P.C. 1 ; 156 L.T. 145.
- (3) *A.-G. v. Merthyr Tydfil Union*, [1900] 1 Ch. 516 ; 37 Digest 226, 188 ; 69 L.J.Ch. 299 ; 82 L.T. 662.
- A (4) *Tozeland v. West Ham Union*, [1907] 1 K.B. 920 ; 37 Digest 214, 99 ; 76 L.J.K.B. 514 ; 96 L.T. 519.
- (5) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539 ; 36 Digest 61, 385 ; 92 L.J.K.B. 389 ; 128 L.T. 690 ; *on appeal*, [1923] 2 K.B. 832.
- (6) *R. v. Newtown Union* (1864), 28 J.P.Jo. 725 ; 37 Digest 203, 19.

- B ACTION by the two plaintiffs, husband and wife, for damages for breach of contract and for breach of statutory duty. On behalf of the female plaintiff, it was alleged that (i) the public assistance committee promised to supply her with artificial dentures, and (ii) a recommendation of the medical officer for such supply was binding on the committee.
- C On behalf of the defendants, the existence of any such contract was denied, and it was contended that, in refusing to supply the artificial dentures, they were merely exercising their discretionary powers.
- William Gorman, K.C.*, and *B. R. Rice-Jones* for the plaintiffs.
Hartley Shawcross, K.C., and *R. S. Trotter* for the defendants.

- D HALLETT, J. : In this case, the original plaintiff was Margaret Cresswell, who is the wife of Norman Cresswell, but by an amendment which was made with leave on Dec. 31, 1938, the husband, Norman Cresswell, was also added as plaintiff. The person who suffered as the
- E result of what is complained of in the action was Margaret Cresswell, the wife, and, so far as the evidence discloses, I can see nothing to suggest that the male plaintiff has suffered anything, either in person or in pocket, as the result of the matters of which complaint is made. I do not think that any distinction between these two plaintiffs ought to be
- F drawn.

- The defendants are the Liverpool Corporation, and they are sued in their capacity as the poor law authority for Liverpool under the Poor Law Act, 1930. By sect. 4 (2) of that Act, being part of the section dealing with the constitution of public assistance committees, it is
- G provided as follows :

All matters relating to the exercise by the council of any county or county borough of their functions under this Act, except the power of raising a rate or borrowing money, shall stand referred to the public assistance committee of the council . . .

There follows a further provision with which I need not deal, and then sub-sect. (3) provides as follows :

- H The council may, if the scheme so provides, delegate to the public assistance committee, with or without any restrictions or conditions as they think fit, any of the functions of the council under this Act except the power of raising a rate or borrowing money.

Then there are certain other provisions which enable a further degree of delegation, and the administrative scheme for county boroughs

provides for the appointment of sub-committees of the public assistance committee.

As regards Liverpool, there has been a scheme under which the duties of the corporation with regard to the poor law, to put it quite broadly, were in fact delegated to the public assistance committee, consisting of 90 persons, most of whom are elected persons. Under the same scheme, there is contemplated a further delegation to area sub-committees, and in this particular case the area sub-committee concerned was area sub-committee No. 3. I have stated these matters because it is desirable that they should be on record, but there is no dispute between the parties that, whatever area sub-committee No. 3 did or omitted to do, if it was of such a character as would give rise to a right of action, the proper defendants to the action are the Liverpool Corporation.

The relief claimed by the plaintiffs in this action falls under four heads. Their complaint, put shortly, is that, on Mar. 1, 1938, the area sub-committee No. 3 refused to grant to the plaintiff Margaret Cresswell a free set of artificial dentures. The relief claimed is, in the first place, a declaration that she was then entitled to receive from the poor law authority a free set of artificial dentures. In the second place, there appears to be a claim for the cost of such dentures as a liquidated sum due, apparently, to both plaintiffs from the defendants. I had no evidence at all as to what the cost of the necessary set of dentures would have been to the plaintiffs, assuming that they had been in a position to buy them. I think that probably the cost of them would have been more than the cost to the poor law authority, but I have no evidence as to the proper figure. The cost to the poor law authority would have been £5 10s., and, in so far as it is desirable that I should assess the cost, that is the sum at which I assess it. So far as this head of relief is concerned, however, I need say no more, because I can see no possible ground on which it can be said that the corporation ever became indebted to the plaintiffs or either of them in the cost of a set of artificial dentures. Indeed, it is only right to say that, as soon as the point was put by counsel for the plaintiffs, he admitted to me that he was not pursuing any claim upon that ground. The third head of relief which is claimed is damages for breach of a contract, the contract alleged apparently being a contract between the corporation and the plaintiffs, or one of them, whereby the corporation bound itself to provide, and became liable to provide, a set of artificial dentures. The evidence given before me completely failed to disclose anything even resembling a contract. The fourth head of the claim is damages for breach of statutory duty, and it is that claim which is the real basis upon which this case has been conducted on behalf of the plaintiffs. The damages are alleged to have fallen under three heads. In the first place, it is said that the plaintiffs were, or one of them was, entitled to the cost of a set of dentures, which was not granted free. Secondly, it is said that, by reason of not having the artificial dentures from Mar. 1, 1938, when the grant was refused, until the present time, the female

plaintiff had been caused to be ill. There is no doubt that she was suffering from illness arising out of the state of her teeth. However, she was suffering from that illness before her teeth were extracted, and no doubt the illness continued to some extent after her teeth were extracted, although I think it is exceedingly plain, from what little evidence I have, that, after the extraction of her teeth, her condition to some extent improved. There is no evidence before me which in the least convinces me that, by reason of the failure to provide her with artificial dentures, she has been caused to suffer any illness during the last 12 months. I think that such illness as she had had—to mention more particularly indigestion—was illness consistent with the very bad state of her teeth before they were extracted, and I am not satisfied that the provision of artificial dentures had anything to do with it. I therefore think that the second head of damages has not been established. It is then pointed out that being without artificial teeth after the extraction of her remaining natural teeth was very inconvenient and unpleasant for the female plaintiff, and I suppose that that unquestionably was so. Accordingly, I think that, if she has been wrongfully deprived of artificial dentures for a period of some 14 months, that is a matter in respect of which damages might reasonably be claimed. If we assume that the liability can be shown to exist, the assessment of a figure for that is not very easy. However, as I mention it, for convenience—and no physical effect during this time has been shown to have followed from it—I think that quite a modest sum would be a fair sum to award as between the plaintiffs and the corporation. After considering the matter with some care, arriving at the best conclusion I can, the additional figure which I should have awarded under that head—the figure in addition to the sum of £5 10s.—would be a further sum of £25. I mention this question of figures since, when one has gone into the matter thoroughly, it is probably desirable that one should express a view on damages, even though my view renders such an assessment strictly unnecessary.

I now propose to relate shortly the facts of the case as I find them before proceeding to consider the law which, in my judgment, is applicable to those facts. The plaintiff Margaret Cresswell is a woman 29 years of age, I think, and on Mar. 14, 1936, she went to the Walton Hospital, Liverpool, suffering from tonsillitis. While she was at the hospital, she appears to have been advised that the condition of her tonsils was, or might be, caused by the very bad state of her teeth. It seems to be quite plain from the evidence before me that her teeth were in a very bad state, and a state, in the view of the medical people who saw her from time to time, which was likely to cause, and did in fact cause, other complaints. Accordingly, she was advised at the hospital to have her teeth seen to, but for the 6 months which followed that date she appears to have done nothing whatever to comply with the advice which she thus received. At that time, in Mar., 1936, the male plaintiff, Norman Cresswell, had been working regularly as a railway goods porter in the employment of

the London, Midland and Scottish Railway Co., and he was earning 40s. to 45s. per week. Most unfortunately, however, in the summer of 1936, this man met with a great misfortune, because it was found that he had contracted tuberculosis. On July 11, 1936, he ceased to work for the London, Midland and Scottish Railway Co., through no fault of his own, because he was suffering in this way, and it is undisputed that, by reason of that unfortunate disability, he has been unable to work ever since. It is not disputed by counsel for the defendants, and on the evidence I find, that at all material times from July 11 onwards the male plaintiff did come within the category of "the lame, impotent . . . and such other persons as are poor and not able to work" within the meaning of the Poor Law Act, 1930, s. 15 (1) (b). With regard to the female plaintiff, she had, as far as I am aware, no employment at any material time, and she was dependent upon such money as her husband could earn, or was granted to her by way of relief. Accordingly, I understand that it is not disputed, and I am prepared to find, that she also comes within the category of "such other persons as are poor and not able to work," within the meaning of the statutory provision to which I have just referred. Neither of the plaintiffs was entitled to any benefit under the national health insurance scheme, and accordingly they applied to the poor law authority, and, as from June 11, 1936, they were granted relief at the rate of 38s. per week, which was later reduced to 36s. per week. When that relief first commenced to be granted, they had 3 children, but on Feb. 2, 1937, the eldest of their 3 children died, and thereupon the relief granted was reduced by 2s. per week, so that the relief became 36s. per week instead of 38s. per week. That position having arisen, in Oct., 1936, the female plaintiff saw a man named White, the relieving officer for the district where she then resided, and she told him what the hospital had said to her about the necessity for obtaining attention to her teeth. Thereupon White gave her what I think I can best describe as an order on the district medical officer.

Under the Poor Law Act, 1930, the general superintendence of the administration of the relief of the poor throughout England and Wales is entrusted to the Minister of Health by sect. 1. There are other provisions in the Act which I need not more particularly identify, authorising the Minister of Health to issue regulations in pursuance of that power of superintendence so conferred upon him, and amongst the regulations which he has issued is the Public Assistance Order, 1930 (S.R. & O., 1930, No. 185), dated Mar. 20, 1930. Reg. 167 deals with the duty of the relieving officer, and by para. (10) of that regulation it is provided as follows :

The relieving officer shall . . . (10) in any case of sickness or accident requiring relief by medical attendance, procure such attendance by giving an order on the district medical officer or by such other means as the circumstances of the case may require.

I think, although counsel did not inform me about it, that it was probably

under that regulation that White gave that order on the district medical officer to which I have just referred. Having obtained that order from the relieving officer, the female plaintiff saw Dr. Edwards, the district medical officer of her district, and on Oct. 6, 1936, Dr. Edwards gave her a dental certificate. It sets out under the column headed "Sickness and nature of recommendation" the words "Dental case," and the recommendation is: "(1) Extraction only. Yes." The second place, "Provision of dentures," is left blank. That is signed by Dr. Edwards, the district medical officer. Once more I think that I ought to refer to the Public Assistance Order, 1930, because it appears to me that it was under one of those regulations that Dr. Edwards gave that certificate. Regulation 166 is as follows:

The district medical officer shall . . . (5) give to the council, when required by them, any reasonable information respecting the case of any poor person who is or has been under his care, and certify in writing, on the request of the council or of a relieving officer, or of the poor person on whom he is attending, the sickness of the poor person, or other cause of his attendance on him.

I attach very considerable importance to that paragraph in the regulation, having regard to the argument which has been put before me as to the position of the district medical officer, an argument which certainly lies at the very root of the case made for the plaintiffs in this action. In passing, I only point out once more this function of the district medical officer with regard to this certificate. Quite clearly, as appears there, upon the request of the relieving authority or the relieving officer or the applicant for the relief, the district medical officer is bound to give a certificate stating the nature of the illness of the person in question, and he is further bound to give information to the relieving authority if they call upon him so to do. He then gave that certificate to which I have referred, and, having regard to the information contained in that certificate, the next thing which happened was that on Oct. 20, 1936, the area sub-committee No. 3 decided to grant to the applicant, Margaret Cresswell, what is conveniently called a dental letter. As a fact, on the following day, Oct. 21, 1936, a dental letter was issued. It is necessary, I think, to look at that document a little closely and see what the scheme of it is. It is divided on its face into sections. The first section is as follows:

A. To the applicant. With reference to your application for dental treatment, you should hand this form to any registered dentist whom you may choose, and who is prepared to undertake the treatment. . . .

Thus, the applicant is allowed to choose her dentist. Then again the second section is addressed to the dentist by the public assistance officer, and is as follows:

B. Kindly examine the above-named and enter in the appropriate spaces overleaf details of the necessary treatment, together with an estimate of the cost. . . .

Then there are some further instructions to the dentist. The district medical officer furnished the applicant with a dental letter, telling her

what to do with it. She then went to a dentist named Farrall, and on Oct. 26, 1936, the dentist filled up sect. C as follows :

To the public assistance committee. I have examined the above-named and have entered overleaf details of the necessary treatment and its cost. I agree to carry out the work. . . .

Then he recommended the extraction of the applicant's remaining 19 teeth, and he gave an estimate of the cost of doing it—namely, 25s. The next step is that that recommendation of treatment and estimate of its cost are submitted to the dental consultant employed by the public assistance committee. The dental consultant at the material time was a gentleman named Fairhurst, and in this particular case he agreed with the suggested treatment and approved of the suggested cost. On the back of the form there is a place for the dental consultant's approval, and in this case he approved of the dentist's suggestion and estimate on Nov. 2, 1936. That approval having been obtained, on Nov. 27, 1936, sect. D was filled up. Sect. D is addressed to the dentist and signed by the public assistance officer, and is as follows :

The estimate overleaf is approved, and the public assistance committee will pay £1 5s. upon the satisfactory completion of the work.

Thereupon the dentist is authorised to proceed with the work which he has recommended, and at the cost which he has estimated. There seems to have been a long delay. At that stage, the applicant could have gone to the dentist and said, "Here is the letter which is your authority to proceed. Get on with it," but she did not do so. She said that she had trouble, and that her eldest boy had died. It is true that she waited 6 months after the hospital gave her advice before doing anything, and then she waited another 6 months, because it was not until May 19, 1937, that sect. E is completed, and sect. E has to be signed by the dentist and forwarded to the public assistance committee within one month after completion of the treatment. He says as follows :

I have now completed the dental treatment for this patient as specified overleaf. I therefore claim payment of £1 5s., being my fee in connection with the work done.

On May 20—there is no delay in that—on the back one finds these words : "Payment of the above fee is authorised—Dental consultant."

It will be observed that, before Margaret Cresswell's teeth were extracted, the area sub-committee had before it three pieces of medical advice. In the first place, they had the certificate of the district medical officer. In the second place, they had the opinion of the dentist. In the third place, they had the opinion of the dental consultant recorded in the way I have shown. They had three opinions in that particular case, and at that particular stage they had three different medical advisers. In the word "medical" I include the word "dental."

The contention for the plaintiff is that of those three advisers only one mattered. In reply to certain questions from me, counsel for the plaintiffs admitted that, according to his contention, the area sub-committee were bound by the opinion of the district medical officer, and that, even if the

dentist chosen by the plaintiffs themselves disagreed with the view of the district medical officer, and even if the dental consultant employed by the public assistance committee also disagreed, yet the opinion of the district medical officer was binding upon the public assistance authority, and they had no power to consider or act upon anything else. In my opinion, that view has only to be stated to be found to be quite obviously wrong. I take the view that the public assistance authority is bound on medical questions to obtain proper information, and that, in order that the public assistance authority should have proper information, among other things, the regulation to which I have just referred casts upon the district medical officer the duty of supplying such information in certain cases. In my view, however, the public assistance authority are the people who have to make the decision, and they are not precluded from arriving at the conclusion which they think proper by the views of anybody else. The Poor Law Act, 1930, s. 15 (1), provides as follows :

C It shall be the duty of the council of every county and county borough . . . (b) to provide such relief as may be necessary for the lame, impotent, old, blind and such other persons as are poor and not able to work.

I have already found that both the plaintiffs fall within the category of "such other persons as are poor and not able to work," but I have still to consider "such relief as may be necessary." Counsel for the plaintiffs has treated that word "relief" as being used in the section in the same way as that in which it is used in ordinary life in talking of the relief which a person who is sick or in pain may require. If my teeth are aching, there is no doubt that I require some form of dental relief. If all my teeth have been taken out, probably most people would think it reasonably clear that I require relief in the sense of something to take the place of the teeth which have been extracted. That is relief in one sense—in the sense of relief from pain or sickness or physical deficiency—but the word "relief" here has rather a wider meaning than that. "Such relief as may be necessary" does not mean merely such assistance as physically may be required. It means, as I understand it, "such assistance as it may be necessary that these people should have free." That is the aspect of the matter which the public assistance authority have to consider as well. The public assistance authority have not merely to consider whether or not the female plaintiff needs to have artificial teeth. That is part of what they have to consider, but the whole question which they have to consider is whether or not she needs artificial teeth free at the particular moment when they make their decision. It is that problem as a whole which the public assistance committee have to consider. As to her physical need, they are guided, or should be guided, by the medical information they have, but as to the other need—as to whether the artificial teeth are immediately necessary, and immediately necessary without any payment at all on her part—I see no reason why they should be conclusively bound by the medical information contained in the document to which I have referred.

I now continue a little further with the chronological statement of the facts. I have said that the extractions were completed on May 19, 1937, and that, as a result, the remaining 19 teeth of the female plaintiff had been extracted. They apparently were in such a bad condition that everyone concerned was unanimous in saying that she would be better without them. Having waited 6 months from the time A when she was given the complete dental letter to the time when she used it to get the teeth extracted, she went and saw Mr. White, the relieving officer, again. It appears, however, that in the interval she had moved from one district to another, and, as a result, Mr. White was not the proper relieving officer, so she was sent by him to another relieving B officer, Mr. Ormond, and the only scintilla of a contract which can be found at all is in what was said to the female plaintiff by Mr. Ormond when she went to see him. According to her, all that was said by Mr. Ormond was this. He gave her once more an order on the district medical officer, which I will refer to in a moment, and he said to her, C according to her own evidence :

If the doctor recommends you to have your teeth [he meant artificial dentures], you should have them.

How, upon that, I can possibly find a contract by the Liverpool Corporation to provide artificial dentures to Mrs. Cresswell I am at a loss to D understand, and counsel for the plaintiffs was at a loss to understand it too, because, when that evidence was forthcoming, with his usual frankness he said that he could not build a contract upon that. Thereupon Mr. Ormond gave the female plaintiff an order on the district medical officer, no doubt under the regulation to which I have referred, and she E went to see the district medical officer, a Dr. Condell, the change from Dr. Edwards being again, I understand, due to change of district. Dr. Condell, acting again under reg. 166 (5), gave her a dental certificate, and I think I can say without exaggeration that the whole case for the F plaintiffs depends upon the existence and contents of that document. Therefore it is of some importance that I should refer to it. It is dated Jan. 26, 1938. It is headed :

City of Liverpool¹, Public Assistance Committee. Dental treatment. Name, Margaret Cresswell. Sickness and nature of recommendation.

The sickness is given as "Dyspepsia, edentulous," which dyspepsia I G understand arises through being without teeth. Then there are these words : "Extraction only—Yes." That is curious, because the extraction had been done in the previous May, and this was January.

(2) Provision of dentures.—Yes. (3) Is the applicant capable of and available H for work?—Own housework. (4) Is he/she suffering physical deterioration on account of dental condition (state nature of complaint)?—Dyspepsia. (5) Will the provision of dentures fit him/her for employment?—No. (6) Any other special reasons for recommendation?—No. I certify the above particulars to be true. W. H. Condell, District Medical Officer.

There is a certificate which I think certifies that, in the opinion of the district medical officer, dentures were desirable. It is said by counsel

for the plaintiffs that that was conclusive of the whole matter, and there-upon as a matter of law the area sub-committee, on behalf of the defendants, were bound to provide the set of dentures, and that, since they have failed to do so, the defendants are exposed to this action. I think that I ought to conclude the narrative before I say anything more.

- A That dental certificate having been given by Dr. Condell, the matter appears to have been referred to the dental consultant. There was a slight alteration in the order of events. Apparently, when it was a matter of extraction, the matter went to the dentist, and then to the dental consultant after the dentist, but in this case it went to the dental
- B consultant before it went to the dentist, and on Feb. 14, 1938, there is a document which is signed by Mr. Fairhurst, the dental consultant. It is a form which has not been completely filled up, because it is so framed in the printed part that it appears to be a form which is intended to be sent to the dentist in order to give the opinion of the dental consultant. The
- C material part is in the "Remarks," where the following words occur :

Extractions completed 18/5/37. Full dentures are now required to restore masticatory efficiency.

Thus the plaintiffs were entitled to say that the dental consultant took the view that full dentures were then required on Feb. 14, 1938, to restore

- D masticatory efficiency.

I desire to emphasise my view that neither the district medical officer nor the dental consultant was in a position to decide, nor had authority to decide, whether or not relief by way of free provision of dentures was necessary within the meaning of the Poor Law Act, 1930, s. 15. What

- E they were able to decide, and entitled to decide, was that, according to their opinion as medical men—using, as I said, the word "medical" to cover dental—full dentures were required to restore masticatory efficiency. Furthermore, the district medical officer took the view that the absence of masticatory efficiency was having a bad effect on the
- F digestion of the female plaintiff. On Feb. 15, the public assistance officer put forward to the committee a medical certificate and the dental consultant's report, and on Mar. 1, 1938, the female plaintiff attended before area sub-committee No. 3. After consideration, the grant of free dentures as at that time was refused.

- G On Mar. 23, 1938, the decision of the area sub-committee came up for review by the public assistance committee, and the recommendation of the area sub-committee with regard to the female plaintiff was approved by a large majority upon a vote. On Apr. 6, 1938, the report of the proceedings of the public assistance committee was submitted to, and
- H adopted by, the corporation.

On June 25, 1938, there was written on behalf of the female plaintiff a letter in the form which is usually written before action, setting out in a very brief form the sort of case which is now being made on behalf of the female plaintiff. On July 9, 1938, a letter in reply, written by the town clerk on behalf of the defendants, is to a considerable extent argu-

mentative, and there is only one paragraph which I need now read, which is as follows :

In reply to the penultimate paragraph of your letter, the reason why the public assistance committee refused to provide your client with dentures was because, in their opinion, dentures were not necessary, and this decision was confirmed by the council as recently as April last.

I read that paragraph because it forms a convenient introduction to the examination I now have to make of the arguments put forward on behalf of the plaintiffs in point of law. The first point which counsel for the plaintiffs seeks to establish on behalf of the plaintiff is this. He says that, having regard to the relevant statutory provision, or provision having statutory form, it was not for the public assistance committee or the area sub-committee No. 3 to determine whether or not this grant of free dentures was necessary within the meaning of sect. 15. His submission to me is that the area sub-committee had no discretion to determine that at all, because the matter was conclusively decided by the certificate of the district medical officer to which I have already referred. When the argument had proceeded some way, in answer to a question from me he faced the position, and said that, according to this aspect, the district medical officer's decision overrode everything, although there was the opinion of the dentist and of the dental consultant, and certainly overrode any discretion which might otherwise be left in the area sub-committee acting on behalf of the defendants. The first question which at once arises is where counsel for the plaintiffs found in the statutory provisions, or provisions having statutory effect, that placing of the district medical officer in the position of the supreme and uncontrolled officer to decide what he thought was necessary for a particular applicant within the meaning of sect. 15 when that relief is of a medical nature. In the first place, I was asked to look at the Unemployment Act, 1934. That Act, of course, has no direct relevance, and it is not suggested that it has, but counsel for the plaintiffs puts forward certain of the matters contained in that Act as calculated to assist me in arriving at a correct conclusion as to the effect of the Poor Law Act, 1930. The Unemployment Act, 1934, Sched. VIII, Part I, provides as follows :

1. A public assistance authority shall not order outdoor relief to be given [to various classes of people]. Provided that . . . (ii) this paragraph shall not apply to the granting of relief in respect of the medical need of any person. . .

There is something more. If one looks at the Unemployment Act, 1934, s. 38 (4), once more one finds that there are certain provisions dealing with what allowances may or may not be made. In sect. 38 (4) there appear the following words :

In this section the expression "need" does not include medical need.

Therefore, says counsel for the plaintiffs, when one looks at Sched. VIII, Part I, para. 1 (2), or sect. 38 (4), one finds that the legislature is trying to make distinction between needs generally of unemployed persons and medical needs, and it further appears from sect. 54 (1) of that Act that

- medical needs means the need of medical or surgical assistance, including any need of drugs, medical or surgical appliances, or of nursing or similar services. Medical and surgical includes optical or dental. Therefore, it is argued, under the Act of 1934, medical need is defined as including dental appliances, which would include artificial dentures, which are
- A regarded as standing in a category of their own. Coming to the Poor Law Act, 1930, and the regulations thereunder, counsel for the plaintiff particularly relies upon the Public Assistance Order, 1930, and still more on the Relief Regulation Order, 1930, made in Mar., 1930, by the Minister of Health. Under the Public Assistance Order, 1930, reg. 6, "relief"
- B means poor relief, "institutional relief" is given a certain meaning, and "relief in kind" means relief afforded by the grant of food, medicine and other articles of necessity, or by the provision of temporary lodging. Thus, in that paragraph two kinds of relief seem to be contemplated—
- C institutional relief, on the one hand, and relief in kind—and relief in kind appears to include all relief afforded by the grant of other articles of absolute necessity, including medicine. In other words, relief in kind seems to include what in the Unemployment Act is defined as being medical relief, and in particular the granting of artificial dentures, if they are articles of absolute necessity. When, however, one comes to the
- D Relief Regulation Order, 1930, one finds something rather different. Reg. 10, on which counsel for the plaintiffs strongly relies, provides as follows :

- Relief (other than institutional relief, relief in kind or medical relief) shall not be afforded to a person . . . unless a written statement of a medical officer showing the nature of the disability is laid before the committee or sub-committee considering the application : provided that . . . the committee or sub-committee may . . . grant relief although no such statement is laid before them.
- E

- It will be observed there that there are 3 kinds of relief which are excepted from the arrangement—institutional relief, relief in kind, and medical
- F relief. Thus, medical relief is treated there as a separate category, and under reg. 2 (2) medical relief means relief other than institutional relief afforded by the grant of surgical or medical assistance supplied by, or on the recommendation of, the medical officer. Counsel for the plaintiffs relies apparently upon those regulations which I have read as establishing
- G that, where a medical officer has recommended the supply of a form of medical or surgical assistance, or other matters or things of a similar nature, the committee or sub-committee considering the application of the applicant for relief has no option but to confirm the medical officer's recommendation and to give those things, free and at once. In my
- H opinion, the regulations afford no support to that view at all. On the contrary, I say that reg. 10 is really inconsistent with that view. What reg. 10 says is that relief shall not be afforded to certain persons unless a written statement of a medical officer showing the nature of the disability is laid before the committee or sub-committee considering the application, and it is provided that the committee or sub-committee may grant

such relief though no such statement is laid before them. It seems a *non sequitur* that, because the committee or sub-committee are not to grant relief on the ground of sickness or bodily infirmity without the information, therefore, when they have such information, they must consider themselves bound by the medical officer's recommendation. That is a complete *non sequitur*, and it is to be observed that that section only applies to relief other than institutional relief—relief in kind and medical relief, and medical relief means relief supplied by, or on the recommendation of, the medical officer. Therefore, it is plain that, if there is a recommendation of the medical officer, there is no need also to have a written statement of the medical officer showing the nature of the disability. They have the recommendation in common form, but, where a question is involved, they are told that they must not act without having medical information. There does not seem to me to be any reason to contemplate that, when they have the medical information, they must treat what the medical officer says as something binding on them, and a matter into which they have no discretion to inquire at all. This is the more so when one realises that what the district medical officer does is to express a medical opinion. What the dental consultant does is to express a dental opinion, and those opinions are, in my judgment, necessary only in order to establish whether or not such relief—that means relief by way of treatment—is necessary under sect. 15 of the Act. A B C D

That is the first point—namely, that the area sub-committee are deprived of all power for the exercise of any discretion at all once they have got such a certificate before them as in the present case. I can find no authority for that contention. On the contrary, it conflicts with the whole scheme of the Act, as I read it, which is to entrust the discretion—a very onerous discretion—to the authority, who are, after all, I might perhaps venture to remark, an elected authority, because the public assistance committee comprises the bulk of the elected members of the council, and a few others are members or representatives of important bodies who take up this particular work. E F

The next point which counsel for the plaintiffs makes is this. He says that he has assumed that it was for the area sub-committee to decide. They never assume that in that sense. They never exercise that discretion. The only discretion which they had, according to my view, is that of deciding a question of necessity in a particular case. However, counsel for the plaintiff says that they have not exercised that discretion, and he relies on various things. Originally, he relied very much on what took place at the early meeting of the sub-committee. There is not a scintilla of evidence from the female plaintiff which goes to show that her case was not properly considered and decided on the right grounds by the area sub-committee. Counsel for the plaintiffs, however, says that he has "certain documents which put a different complexion upon the matter," and he has referred me to certain documents. I propose to refer G H

in detail to one or two of the passages on which he relies, but I can sum up a good many of these documents by saying that they undoubtedly disclose that the cost of the poor relief in general, and the cost of dental relief in general, and the cost of providing free dentures, were under the active consideration of the appropriate poor law authority. A great deal of money had been spent on that type of relief, and there is no doubt that the appropriate authorities were getting anxious about the extent of the expenditure, and I desire to say plainly that I think there is authority to say that it is the duty of the poor law authority, amongst other things, to consider the question of expense. It is their duty not to allow the matter of expense to deter them from doing their duty to give relief, but it is equally their duty not to give relief without considering the question of expense. Therefore, I think that it is their duty to regard both aspects of the matter, and to give proper attention to both. As a fact, they were worried by the high cost of this form of relief, and that does not in the least show that, when the case came before them, they neglected to do their duty. Counsel for the plaintiffs says, however, that it does not quite rest upon that general rule of considering economy which the documents disclose. It goes further than that, and in particular he relies upon a report of the meeting of the finance and general purposes committee of the public assistance committee, dated Mar. 26, 1936, dealing, *inter alia*, with the cost of this dental assistance. It may be useful if I read it. It is from a passage in this report that I made up my estimate of £5 10s. for dental assistance. Then there are certain observations which seem to me to be perfectly sound. They cite a circular from the Local Government Board which points out that destitution need not be destitution in all respects, and that, if an applicant cannot provide himself with a particular form of treatment which he needs, he can be provided with that. Then it makes some observations pointing out that the district medical officer is looking at the matter from the medical point of view, and the dental consultant or dentist is looking at the thing from the dental point of view, and that these are not the only points of view which have to be considered, and in that I can see no possible ground for complaint. Then it is suggested, however, that medical recommendations in such form—that is, the form suggested in the medical officer's certificate to which I have referred—will materially assist the district sub-committees in appraising the particular need of any applicant, and so forth. In my opinion, that puts the matter absolutely right. That is what medical recommendations are for. They materially assist the district sub-committees in appraising the particular need of any applicant. Nevertheless, they are not to be substituted for the appraisal which it is the duty of the district sub-committee to form. Then there comes the paragraph upon which very rightly and naturally counsel for the plaintiffs strongly relies. I ought to say that this document is signed first by the medical officer of health and then by the acting public assistance officer, and it is merely in the nature of a report and recommenda-

tion to the public assistance committee. The paragraph upon which reliance is placed by the plaintiffs is as follows :

The sub-committee might also consider giving a definite indication with regard to those persons for whom dental treatment should not proceed further than granting necessary extractions—(a) Men over 55 years of age. (b) Women who have passed the age of child-bearing. (c) Persons who report having “lost” their artificial dentures.

Then there is a paragraph saying that people have turned up saying that they want artificial dentures, and that they have never had them, when it is quite clear to the dentist that they have had artificial dentures before, and that, when challenged as to this, and as to what has happened to the dentures, these people say that they have lost them in the Mersey. That has happened with considerable frequency. In these cases, the facts were reported back to the appropriate sub-committee, who then exercised discretion as to granting dentures. I said that counsel for the plaintiffs rightly attributed importance to that paragraph. I feel, myself, at least grave doubt as to whether or not the public assistance authority are entitled to lay down categories of people who, although they may be within the words of sect. 15, “lame, impotent, old, blind, and such other persons as are poor and not able to work,” are not to be granted relief in the form of free dentures. I am not at the moment satisfied that the public assistance authority are entitled to say : “We will never give free dentures to a man over 55, or to a woman who has passed the age of child-bearing, or to a person who has lost his artificial dentures.” I do not think that it is necessary to define the point, for this reason. In the first place, that was a recommendation. However, that does not dispose of the matter, because it turns out that later on that recommendation was apparently accepted. If one looks at document No. 11, there is the following passage :

At the committee's request the medical officer of health and the acting public assistance officer reported in Apr., 1936, jointly, and it was then decided by the committee that the scheme for the provision of dentures should not apply to certain classes of patients except as far as necessary extractions were concerned.

I am not quite satisfied in this case that it is relevant to express an opinion on points which are not relevant, but it is necessary that I should say that I feel at present grave doubt whether a public assistance authority can lay down classes of persons to whom dental relief is not to be afforded on the ground of expense. It may be that they can do so, but I am not satisfied about it. However, I do not think that I need really come to any conclusion on the matter, because this particular applicant is not a man over 55 years of age, nor a woman who is past the age of child-bearing, so far as I know, nor a person who alleges she has lost her artificial dentures in the Mersey, or at all. It is common ground that she had all her teeth out at the expense of the public assistance authority, and, therefore, she does not come within these categories. Consequently, the question as to whether or not they had refused her does not arise for my decision. I have come to the conclusion that these

documents have no relevance at all, except in so far as they plant in my mind the fact that this particular area sub-committee was in other respects and in other cases considering itself entitled to act upon rules the validity of which appears to be doubtful.

A There is one other matter to which I ought to refer, and then I shall have done justice to all the arguments of counsel for the plaintiffs. It appears that there was a recommendation that all those dental cases referred to in the epitome in which the cost exceeds £6 each be referred back to the sub-committee concerned for further consideration, and with a recommendation that extractions only be granted at this stage. That was on Jan. 20, 1937, and again I express no opinion about it. I think that it is quite right to reconsider those cases, but as to a recommendation that nothing should be granted if it involved more than a certain expense, I doubt whether that is right. Why I should assume that the area sub-committee were acting on a wrong principle in Mar., 1930, I am unable to understand. It is a mere speculation, and an unfair speculation at that. The only remaining document at which I have to look contains a para. 6 which is undoubtedly important, and that paragraph seems to me to put the matter in a way against which no complaint can be made. I will not encumber my judgment by reading all of it, but I will read this one sentence :

It therefore appears proper that consideration of a second and separate application for dentures should be postponed for a reasonable period, at least until such time as absorption of gums has occurred.

E There is nothing wrong about that at all. All those things go to show, according to counsel for the plaintiffs, that this area sub-committee did not perform their duty, that they acted upon some artificial rules, upon which they were not entitled to act. As to this, I say quite plainly that I cannot agree with counsel for the plaintiffs. His remaining point was that the area sub-committee cannot refuse these dentures on any legitimate grounds, having regard to the opinions of the district medical officer and the dental consultant which they had received. I do not agree. I do not consider that the area sub-committee have acted on improper grounds. That must be proved. I can quite understand that, having regard to these medical opinions, the area sub-committee would have hesitated before granting dentures, but there is no reason why they should disguise the fact that throughout the case they felt a very considerable amount of sympathy for the female plaintiff. She had had all her remaining teeth extracted, and then found herself with no artificial teeth in their place. That is a matter which can properly command sympathy, but I cannot think that there was not an amount of sympathy amongst the members of the area sub-committee, and I am not satisfied that the reasons for their decision were not reasons which it seemed to them that they were entitled to take into account on Mar. 1. I think that certainly they may not have properly and legitimately come to the conclusion that, although from the medical and dental point of view she

would be better off with a set of dentures, yet within the meaning of sect. 15 (1) (b) such relief was not necessary for her, being a poor person not able to work. They asserted in the town clerk's letter which I have quoted that they had come to that conclusion. Therefore, I think that the second ground of counsel for the plaintiffs fails. Strictly speaking, that would be sufficient to dispose of the present case, but, having regard to the careful argument which has been addressed to me, there is one further aspect of the matter with which I consider that I ought to deal. Perhaps I ought to mention at this stage that, whilst I heard counsel for the plaintiffs fully in the case, when it came to the turn of counsel for the defendants to address me on behalf of the defendants, having arrived at a clear conclusion as I had done on material points, I stopped him, and his arguments did not go far, and therefore I did not receive from him that assistance which otherwise might have been forthcoming. A B

The next difficulty of counsel for the plaintiffs was this. Assuming either that the corporation had no right to decide that this form of relief was unnecessary, or that, having a right to decide it, they failed to do so for any improper reason, counsel for the plaintiffs still had to show me that the female plaintiff was entitled in law to proceed in this form and obtain the relief claimed in this action, and for that purpose he made certain submissions here. In the first place, he pointed out that the Poor Law Act, 1930, was a successor to various Poor Law Acts, of which the first was the Act of 1601 in the reign of Queen Elizabeth—that is, 338 years ago—and he held out to me what may or may not have been the tempting prospect that by my decision in this action I should be deciding something which had never been decided in those 338 years. However, so far as I am aware, there never has been an action of this kind brought by any applicant for relief in any English court. I say English court because I shall have to refer to what happened in the Scottish courts. Counsel for the plaintiffs gave me the prospect of being associated with the first decision of this sort of action, but I think that the fact that no such action has been brought for 338 years has some significance. Counsel for the plaintiffs says that the defendants have a duty, that they have a duty imposed by sect. 15, and that, because they have a duty to grant relief of this kind, therefore the plaintiffs have the correlative right to demand it. For that proposition he relied upon an interesting Scottish case, *Jack v. Isdale* (1), a decision of the House of Lords in Feb., 1866. The actual point of that case, however, was this. It was a question of whether the Poor Law Board of Scotland had a discretionary power to grant relief to able-bodied persons although those persons were ready and willing to work, and were in destitution from the want of employment, and it was held that the Poor Law Board of Scotland had no such discretion. Apparently they had taken the view then that these people were willing to work and were simply in destitution for want of work, yet they were able-bodied poor who should be excluded from relief. The House of Lords held that that was a wrong view, and that the Poor Law Board of Scotland C D E F G H

had no discretion about granting relief to able-bodied persons. In arriving at that conclusion, they paid attention to the fact that able-bodied persons had no right to require relief in those circumstances, and their Lordships said that, inasmuch as able-bodied persons had no right to require relief or right to relief—because it was thought that there was no important difference between the two expressions—the relieving authority had no right to grant it, and it was in that action that it was said that the right to grant and the right to receive relief must be correlated. The way in which counsel for the plaintiffs tried to use this case was by turning it round and saying that, their Lordships having held that there was no right to grant unless there was a right to receive, if there is a right to grant, there must be a right to receive. I think it is sufficient to point out two things. In the first place, the fact that there is a right to demand relief in one case does not, to my mind, get one very far in deciding whether there is a right to bring an action if the demand fails. As a moral proposition, it is quite sound that those who receive benefit have a right to require that the duty to provide it shall be performed, but I do not know how far that takes one in law. The poor law relief in Scotland, as administered, makes it plain that an applicant for relief enjoys a position of considerable advantage as compared with similar applicants in this country.

The next case to which I must refer on this aspect of the matter was also a Scottish case, though of much more recent date, *Duncan v. Aberdeen County Council* (2). The actual question at issue in that case was quite irrelevant to anything we have been discussing here, because it was a question of how the relief to be granted to a certain type of person should be calculated. The case is put in the plainest form for present purposes by LORD THANKERTON, who expressed himself upon it at p. 916. In Scotland, apparently, a refusal to give relief can be the subject of an appeal to the sheriff, and the question of the adequacy of the relief can be the subject of appeal to the administrative authority—namely, the Poor Law Board for Scotland. Therefore, there is a legal right of appeal to the sheriff in one case and to the Department of Health in the other. It is quite true that LORD THANKERTON was talking about a person having the right to relief, and the position of the sheriff, in the one class of case, or the Department, in the other, would seem really to be well defined, but I can find no corresponding position in the Poor Law Act, 1930. On the contrary, I do find that in sect. 1 of that Act there is the following very striking provision :

(1) The Minister of Health . . . is, subject to the provisions of this Act, charged with the direction and control of all matters relating to the administration of relief to the poor throughout England and Wales, according to the law in force for the time being : Provided that nothing in this Act shall be construed as enabling the Minister to interfere in any individual case for the purpose of ordering relief.

That seems to be definitely contrary to what apparently is the law of Scotland, as described by LORD THANKERTON. Again, sect. 16 (2) provides as follows :

Except as in this Act expressly provided, it shall not be lawful for a justice of the peace to order relief to any person.

The position of the sheriff in Scotland is quite different from the position of the justice of the peace in this country, and what is said in *Duncan v. Aberdeen County Council* (2) is of no possible assistance to me in deciding what I have to decide here.

The next class of case counsel for the plaintiffs referred to was a class of case for which his first example was *A.-G. v. Merthyr Tydfil Union* (3). A That was a case in which the guardians had granted relief to able-bodied men who could, if they chose, obtain work, but by reason of a strike refused to accept it. The guardians having systematically granted relief to such men on the ground that they were entitled to grant it, certain of the ratepayers caused the Attorney-General to bring an action on behalf of themselves and other ratepayers against the guardians of the poor. B The relief claimed originally was, I think, an injunction, but ultimately the claim for an injunction was not persisted in, and all that was asked for ultimately was, I think, a declaration, and it was ultimately decided that the guardians were not entitled to grant relief to such people, and a C declaration was granted accordingly. Counsel for the plaintiffs has submitted to me that, inasmuch as it appears from that case that ratepayers are entitled at least to have a declaration that the guardians are not entitled to relieve a certain class of people, equally the applicant is entitled to obtain a declaration that the guardians are bound to relieve D her. Again, in all deference to the argument, it does not seem to follow either as a matter of logic or as a matter of law. On the law considerations, in the one case the Attorney-General is the plaintiff, and in the other he is not. Counsel for the plaintiffs is not influenced by that. The Attorney-General becomes the plaintiff in the case because it is in the E nature of a representative action in which the ratepayers as a whole are claiming relief, and the fact that he is plaintiff in the action does not seem to interfere with the position. However, there is a fundamental distinction between an action on behalf of all the ratepayers claiming an injunction or declaration, and thereby preventing the funds of the ratepayers from F being disbursed on a wrong principle, and an action by an individual applicant claiming that in his individual case he has not been granted relief to which he is entitled.

Last in the cases on which counsel for the plaintiffs relies there comes *Tozeland v. West Ham Union* (4). G The reason why counsel for the plaintiffs referred me to that case was that it appears in certain textbooks that that case was given as an authority for the proposition that an action cannot be brought against a poor law authority, and counsel rightly said that, if one looks at the case itself, one finds that it does not go as far as, on reading the textbooks, one might suppose. I have not read the H textbooks, but, so far as my observation on the case is concerned, I feel with counsel for the plaintiffs that the case is one which has a limited application. It is a case of a pauper who was set to work by the guardians and suffered personal injuries through the negligence of an officer employed by the guardians, and he brought an action against the guardians for

damages for the negligence of their officer. The case was referred to the county court judge at Bow, but it was undoubtedly the case that the majority of the court held that the relationship between the officer and guardians was not such a relationship as to get rid of the doctrine of *respondeat superior*. That was the ground for the decision. There is a

A judgment of BUCKLEY, L.J., in that case, however, which seems to me to be of very considerable interest and importance for present purposes, because BUCKLEY, L.J., puts his decision upon what seems to me to be much wider ground. He begins by discussing the relationship between the officer and the guardians, and he says, at pp. 934, 935 :

B For the purposes of this judgment I think it unnecessary to determine exactly what was the relation between the guardians and the engineer or assistant engineer who was responsible for the scaffolding. . . . It is not necessary here to decide whether that was right, though I am far from expressing an opinion that it was not. The question there was not one of negligence in ministerial duty, but one of injury to the property of a third party. . . . The question is to my mind entirely different when the plaintiff in the action is a person who is an object of the duties which the
C guardians have ministerially to perform. The proper administration of the poor law is, of course, a matter to be enforced. The question, however, is whether a pauper, in an action brought against the guardians in their corporate capacity, is a person capable of enforcing it. In my opinion he is not. The guardians no doubt owe the duty of providing the pauper with proper and sufficient food, with buildings of proper construction, with proper sanitary arrangements, and the like. But, as
D matter of public policy, it would be impossible that a pauper should be entitled to bring his action against the guardians for default so to do. That is a matter to be controlled by the local government board. To another matter which concerns not the supply to the pauper of that to which under the poor law he is entitled, but the demand from the pauper of the labour which under that law he is compellable to give, the same principle, I think, applies.

Then he goes on to deal with other matters, and he gives judgment
E accordingly. There BUCKLEY, L.J., has expressed his view, upon grounds of public policy, that the individual pauper cannot bring an action against the relieving authority in respect of their duty towards him, in respect of the alleged breaches of the duty which it is said that they owe to him in discharge of their function as such authority. I should perhaps add that
F my attention has been drawn to some of the cases dealing with actions brought by individuals for damages caused by breach of statutory duty, but investigation of them did not proceed very far because I assured counsel that I had to go into these authorities some weeks ago, and counsel will realise that all authorities depend essentially upon the cir-
G cumstances of the particular case. Accordingly, the well-known decision in *Phillips v. Britannia Hygienic Laundry Co.* (5), valuable and interesting as it is in a right connection, does not assist me much. I have to go into the Poor Law Act, 1930, and the regulations made thereunder.

H It is asked what remedy exists for a person who is aggrieved by the failure of the poor law authority to do their duty in granting relief. For the purpose of the present action, I think that it is sufficient to say he is not entitled to claim a declaration, or damages, but, as the point has been raised, I might add this. I think that the plaintiffs are in difficulty. If the defendants, as the poor law authority, have performed their duty here—that is to say, if they have con-

sidered whether or not this form of relief was necessary, and have come to the conclusion that it was not—then, in my view, the plaintiffs must fail, and, in my view, they do fail, because they have failed to satisfy me that the defendants, as the poor law authority, have not performed their duty. However, even if, contrary to what I have already decided, the plaintiffs were to establish that the defendant corporation, the poor law authority, had failed to perform their duty, even then I think that they would be in a difficulty, because, in my opinion, this is not the remedy they are entitled to seek. In my opinion, for that reason, the remedy which they would have to seek would be an action for an order in the nature of *mandamus* directing the proper authority—in this case, the defendant corporation—to perform their statutory duty. I find some support for that view in *R. v. Newtown Union* (6), where there was a rule *nisi* for *mandamus* to administer medical relief granted. It seems to be indicated that, if there can be established a failure of the poor law authority to perform its duty, the appropriate remedy is by action for an order of *mandamus* directing that authority to perform its statutory duty. At any rate, I can see no ground for holding that, contrary to what appears to be the opinion of the courts for so many years, that relief can be claimed by way of action such as the action I have now to decide. I should add that I find no real relevant difference between the Poor Law Act, 1930, s. 15, and the corresponding Acts which have gone back for some 338 years. There will be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors : *Silverman & Livermore* (for the plaintiffs) ; *W. H. Baines*, Town Clerk, Liverpool (for the defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

NEW SYSTEM PRIVATE TELEPHONES (LONDON), LTD. v. EDWARD HUGHES & CO. (A FIRM).

[KING'S BENCH DIVISION (Singleton, J.), May 9, 10, 1939.]

Contract—Frustration—Destruction of premises by fire—Telephone installation—Provision for transfer to other premises and for default by hirer.

The plaintiffs installed a telephone system on the premises of the defendants at No. 12, W. Ct. and agreed to maintain it at an agreed monthly rent, such rent to be in respect of the hire and maintenance of the installation. The premises and the installation were destroyed by fire during the term of the agreement. The agreement provided that the entire installation was to remain the property of the plaintiffs and that, in the event of loss by theft or fire, the defendants were to pay £15 in respect of each instrument. There was a provision for the transfer of the installation to any other premises of the defendants, and, in the event of default by the defendants, they were to pay a sum based on the capitalisation of the rent to become due during the period of the agreement remaining unexpired at the time of the default. Although after the fire the defendants removed to other premises, they did not

at any time require the installation to be transferred to any other premises :—

HELD : construing the agreement as a whole, there was no frustration of the agreement upon the destruction of the premises by fire, and the defendants were liable under the default clause for the capitalised sum under the default clause and the sum of £90, being £15 in respect of each instrument destroyed.

A **EDITORIAL NOTE.** No doubt upon first impression this case appears to be one for the application of the principle laid down in *Taylor v. Caldwell* (2), but, upon a full consideration of the terms of the agreement, it was found possible to distinguish the circumstances from those in that case, and to show that the agreement, in effect, provided for the destruction of the premises by fire. The importance of the case lies in the fact that in recent years many such telephone systems have been installed, and no doubt similar considerations will apply to the installation of other apparatus.

B AS TO DESTRUCTION BY FIRE, see *HALSBURY*, Hailsham Edn., Vol. 7, p. 212-217, para. 296; and FOR CASES, see *DIGEST*, Vol. 12, pp. 379-385, Nos. 3131-3166.]

C Cases referred to :

(1) *Horlock v. Beal*, [1916] 1 A.C. 486; 12 Digest 384, 3166; 85 L.J.K.B. 602; 114 L.T. 193; *revsq.*, [1915] 3 K.B. 627.

(2) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 12 Digest 618, 5102; 32 L.J.Q.B. 164; 8 L.T. 356.

(3) *Williams v. Lloyd* (1628), W.Jo. 179.

(4) *Paradine v. Jane* (1647), Aleyn, 26; 12 Digest 371, 3088.

D (5) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, 3194; 85 L.J.K.B. 1389; *sub nom. Re F. A. Tamplin S.S. Co., Ltd., and Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; *affg.*, [1916] 1 K.B. 485; [1915] 3 K.B. 668.

(6) *Appleby v. Myers* (1867), L.R. 2 C.P. 651; 12 Digest 618, 5103; 36 L.J.C.P. 331; 16 L.T. 669.

E (7) *Krell v. Henry*, [1903] 2 K.B. 740; 12 Digest 385, 3168; 72 L.J.K.B. 794; 89 L.T. 328; *affg.* (1902), 18 T.L.R. 823.

(8) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73; 60 L.T. 654.

(9) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 12 Digest 610, 5042; 60 L.J.Q.B. 734; 65 L.T. 286.

F (10) *Redmond v. Dainton*, [1920] 2 K.B. 256; 12 Digest 380, 3141; 89 L.J.K.B. 910; 123 L.T. 297.

(11) *Chandler v. Webster*, [1904] 1 K.B. 493; 12 Digest 407, 3282; 73 L.J.K.B. 401; 90 L.T. 217.

(12) *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A.C. 524; Digest Supp.; 104 L.J.P.C. 88; 153 L.T. 425.

G **ACTION** to recover £163 2s. 4d. due to the plaintiffs from the defendants under a written agreement between the parties for the installation at the defendants' premises and letting on hire for 14 years by the plaintiffs of 6 telephone instruments, complete with accessories. The agreement for hire was in writing, and, so far as material, is set out in the judgment, except cl. 11, which was in the following terms :

H 11. In case of default by the subscriber in payment or observance of the terms of hiring, the company may, after written notice to the subscriber, terminate this contract and remove the installation whereupon the subscriber shall pay to the company all payments then accrued due and also a sum equal to the then present value on a five per cent. basis of the rentals (less 25 per cent. in each case, the

estimated cost of maintenance and value of recovered material) that would have been payable under this contract if not terminated by the company. The said sum shall be payable as liquidated damages, it being an agreed estimate of the loss the company would suffer.

H. J. Wallington, K.C., and E. R. Guest for the plaintiffs.

Cecil R. Havers, K.C., and Maurice Ahern for the defendants.

Havers, K.C.: Impossibility of performance does not excuse the A
promisor when the promise is positive or absolute, and not subject to
any condition, express or implied: *Paradine v. Jane* (4). When a promise is either expressly or by implication conditional, and not absolute, then, if the condition on which the obligation to perform it depends is not fulfilled, the promisor will be excused. This is a case in which B
the courts have implied a term whereby a contract is discharged through impossibility of performance: *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (5). Where performance becomes impossible through the destruction of a specific thing essential to the performance of the contract, the principle applies: *Taylor v. Caldwell* (2) C
and *Appleby v. Myers* (6). The principle also applies where a condition or state of things going to the root of the contract ceases to exist: *Horlock v. Beal* (1), at p. 513, and *Krell v. Henry* (7). The doctrine as stated in *Krell v. Henry* (7) would, in this case, include an implied term that the premises should continue to exist throughout the term of D
the 14 years of the contract. Where supervening circumstances have frustrated the intention of the parties by so changing the circumstances in which a promise falls to be performed that to hold the promisor to it would be to hold him to something which, though it may not be impossible, E
is something different from that which he originally promised to do, the promisor is released: *Horlock v. Beal* (1). Here the fact that the premises were destroyed imports no fault on either side. The plaintiffs cannot carry out a new installation, nor can they maintain any installation at all. There is no express clause in the contract dealing with the case of destruction of the premises by fire. Two reasonably minded F
persons would have thought at the making of the contract that there was implied in the contract the condition that the premises should continue to exist throughout the term of the 14 years of the contract. It is well settled that a term which is inconsistent with an express term of the contract cannot be implied. Nothing in cl. 6 of the contract is inconsistent G
with the implied condition that the premises shall continue to exist throughout. Clause 9 shows that the parties already contemplated that the premises and the installation therein should remain throughout the continuance of the contract. The rental is for the hire and installation, and the maintenance in good working order during the continuance of H
the contract. If the plaintiffs are bound, and are under a liability, to instal new installations at those premises, they cannot do it. If the plaintiffs are not bound to instal a new installation at these premises, the defendants ought not to be held liable for the rent when there is no installation. The relief sought by the defendants is that each party shall be relieved of any

- further performance of the contract, except as to any accrued rights. There is no difference in principle between the doctrine adumbrated in *Taylor v. Caldwell* (2) and the theory of frustration of the adventure. When the question arises with regard to commercial contracts, the language used as to frustration of the adventure merely adapts the
- A** principle to the case in hand: *Horlock v. Beal* (1), at p. 513. In either case, the doctrine or theory rests upon an implication which arises from the presumed common intention of the parties. The test to be applied is that laid down by BOWEN, L.J., in *The Moorcock* (8), at p. 68, and followed in *Hamlyn & Co. v. Wood & Co.* (9)
- B** *Wallington, K.C.*: The ordinary rule of contract is that, if A undertakes to do something, without qualification, he cannot escape his liability to do this if he is afterwards prevented by circumstances which were unforeseen, and perhaps beyond his control: *Paradine v. Jane* (4) and *Redmond v. Dainton* (10). Two questions to be decided are (i)
- C** whether or not this contract was dependent expressly on the continued existence of the premises, or of the installation, and (ii) if not, whether or not it was impliedly dependent upon the same contingencies. These questions are answered after consideration of a portion of the judgment of BLACKBURN, J., in *Taylor v. Caldwell* (3), at pp. 832, 833. In this case,
- D** the premises concerned can presumably, and will probably, be rebuilt well within the period of the contract, and the contract is, therefore, at the most, interrupted, and not frustrated: *Tamplin's case* (5). The plaintiffs' case, however, may be put higher. By cl. 8 of the contract, the parties expressly agree that, at the request of the subscribers, the
- E** installation may at any time during the continuance of the contract be removed to other premises for the remainder of the contract. It would be open to the subscribers to make this request now, and the plaintiffs would have to comply with it, a position entirely inconsistent with the suggested frustration. Further, it is clear that, in
- F** cases of frustration of contract, at the moment of frustration the whole contract is at an end for all purposes. Nothing can be recovered which has not accrued due before the frustration occurred: *Chandler v. Webster* (11). Clause 6 contemplates subscribers to the company making a payment which only becomes due after the occurrence
- G** —namely, the fire—which is alleged to have caused the frustration. Therefore, the parties cannot possibly be said to have contemplated that the loss of the premises by fire shall put an end to the contract. It is impossible for the subscribers to contend that the contract ended for some purposes and not for others: *Maritime National Fish, Ltd. v.*
- H** *Ocean Trawlers, Ltd.* (12). The following are the reasons for stating that there is no room for the implication that the premises and installation should continue to exist during the term of 14 years of the contract. First, such an implication would be inconsistent with cll. 1, 8, and 9. Secondly, the contract does not indicate that the parties intend that any installation shall be, and remain throughout the contract period, on the

premises. On the contrary, the parties plainly contemplate that the installation may be on any other premises, at the request of the defendants. Thirdly, the agreement is not made in relation to a specific telephone installation, but in relation to an installation generally. The following are the reasons for stating that the plaintiffs have not committed any breach. First, they are entitled under cl. 9 to have access A to the defendants' premises to inspect and repair the installation. This involves that the defendants shall first have discharged their obligation under cl. 6 by paying £90 and allowing the plaintiffs to provide a new installation. Secondly, the defendants have not paid the £90, and have refused to have any installation at their new premises. Thirdly, B the defendants were not entitled to make their payment of the £90 conditional upon its being accepted in discharge of their whole liability under the contract.

SINGLETON, J. : This is an interesting case. It arises out of a claim C made by the plaintiffs, New System Private Telephones (London), Ltd., against the defendants, Edward Hughes & Co., who formerly carried on their business at 12, Well Court, Bow Lane, E.C.4. The contract is dated May 15, 1935, and is made between the parties I have mentioned. The defendants in that contract are described as "the D subscriber," and the contract between them embraces this. Clause 1 is as follows :

The company agrees to supply, instal and let on hire at the above premises of the subscriber, and the subscriber agrees to take on hire a telephone installation consisting of 6 instruments complete with all accessories (hereinafter called the E installation) (1 master and 5 substations).

That which was done was to instal a system of telephones internally in the premises which the defendants were then occupying.

There is an agreed statement of facts, and I refer to that agreed statement :

(2) On Nov. 8, 1937, the defendants' premises No. 12, Well Court, Bow Lane, E.C.4, and the plaintiffs' installation therein were totally destroyed by fire without any default on the part of the defendants. (3) The defendants duly paid on Oct. 30, 1937, the quarterly rental of £5 17s. payable in advance on Oct. 1, 1937, pursuant to the said contract. The defendants have not made any payment to the plaintiffs since Oct. 30, 1937. (4) Up to the time of the fire, namely Nov. 8, 1937, all rentals were duly paid to the plaintiffs and the installation was properly G maintained by the plaintiffs and the said contract on both sides was properly performed. (5) During the period Nov. 8, 1937, to July 25, 1938, the defendants carried on business at 10, Queen Street, E.C.4. (6) The said premises, 12, Well Court, are in course of being rebuilt.

At the time of this agreed statement of facts, however, the foundations were not completed, though it is expected that they will be complete in H June, 1939. Then certain changes in the name of the defendant company took place. They are not material to anything which I have to decide. Para. 9 of the agreed statement of facts is as follows :

On June 28, 1938, the defendants tendered to the plaintiffs the sum of £90, being the sum of £15 per instrument at which the said installation is valued under cl. 6

of the said contract and have always been ready and willing to pay the said sum of £90 to the plaintiffs pursuant to the said clause.

Para. 10 is as follows :

If it is held that the plaintiffs are entitled to recover damages under cl. 11 of the said contract, the amount of such damages is agreed to be £163 2s. 4d.

- A That arises in this way. With regard to the rent, which ought to have been paid quarterly, assuming all had gone well, if it was not paid, there was default. Clause 11, of the contract provides what is to happen in the case of default by the subscriber, and the working out of that clause, if it applies, shows that the sum of £163 2s. 4d. is due to the plaintiffs if
- B the plaintiffs prove their case and if the defendants are in default.

In order to come to a decision upon this case, it is, of course, necessary to look at the contract carefully, and to look at the whole of it. It cannot be right to look merely at one clause, but the whole contract must be regarded. Clause 1 of the contract provides as follows :

- C . . . the company [the plaintiffs] agrees to supply, instal and let on hire at the above premises of the subscriber, and the subscriber agrees to take on hire a telephone installation [as described].

Clause 10 provides as follows :

- Unless determined at an earlier date by mutual agreement in writing of the parties hereto, the term of this contract shall be for the remainder of the current calendar year and the following 14 years ; at the end of this term the subscription shall continue until one or other of the parties to this contract gives 6 months' notice in writing expiring at the end of any year.
- D

Thus, in the ordinary way, apart from what happened, the contract would have lasted for a little more than 14 years. Clause 2 of the contract is as follows :

E

The subscriber will pay to the company at the offices of the company in London for the hire of the said installation and for maintenance of the same in good working order during the continuance of this contract, a rental of £5 17s. per quarter in advance, on Jan. 1, Apr. 1, July 1, and Oct. 1 in each year, as per the rates indorsed hereon ; the first payment to be made immediately on the completion of the installation, and to be a proportionate rent from the date of such completion to the next quarter day as above.

F

Clause 3 deals with the free allowance of a certain amount of cable, and payment for any additional cable required for the installation. Clause 4 is as follows :

- The company guarantees to maintain the installation in efficient working order and to execute without charge all repairs and replacements, including battery material, necessitated by fair wear and tear.
- G

Clause 5 is as follows :

The subscriber agrees to notify the company in writing immediately any fault occurs on the installation, or of any repairs necessary to the satisfactory working of the installation.

- H Then cl. 6 provides as follows :

The entire installation shall remain the property of the company and the subscriber shall be responsible for any loss by theft or loss or damage by fire or any damage caused by negligence or otherwise to or by the installation and for the purpose of this clause the installation is valued at £15 per instrument.

Clause 6, as I think, really does no more than provide that the installation

is to remain the property of the company. If loss or damage occurs in the way mentioned in that clause, the subscriber (the defendants) is to be really in the position of an insurer. It can cover that risk, just as it can cover the risk of the destruction of any furniture in its premises or anywhere else. The company are insurers of it. If one instrument is damaged, the value of that instrument is to be taken at £15. If all 6 A instruments are damaged, the amount is £90. They were all destroyed, and the defendants under that clause have been ready and willing at all times to pay the sum of £90 to the plaintiffs. Then cl. 7 is as follows :

The installation shall not in any way be interfered with by the subscriber, except by consent of the company in writing. Any alterations or extensions to the installation necessary or required by the subscriber, shall be carried out by the company at the subscriber's expense. B

Clause 8, to which both sides attach importance, is as follows :

The subscriber shall at any time during the continuance of this contract be entitled to have the installation transferred at his expense to any other premises within the area operated by the company. In the event of his desiring to have it removed to any place in Great Britain or Ireland outside such area the company hereby undertakes at the request and cost of the subscriber to arrange for this contract to be transferred to one of its associated installation companies for the then remainder of the period of this contract. C

The importance of that clause is that it is said that the contract does not contemplate that the installation should be only at the premises of the defendants mentioned at the commencement of the agreement—namely, 12, Well Court, the place at which they were then carrying on business—but there is an option in the defendants to have the installation removed to some other premises, if they so desire. Clause 9, which is also important, is as follows : D E

The company shall at all reasonable times have access to the premises of the subscriber to inspect and repair the installation during the continuance of the hiring and to remove the same after the termination of this contract.

Clause 10 has already been read. Clause 11 is the default clause, to which I have also referred. F

In the circumstances, having regard to the destruction by fire of the premises and the installation on Nov. 8, 1937, the plaintiffs claim that the rent continued to run, and would continue to run during the residue of the period of 14 years, and that, there being default, they were entitled to apply the provisions of cl. 11. The defendants, on the other hand, say that, by reason of the destruction of the premises, the contract ought to be regarded as at an end, and that the defendants' obligations under that contract must be taken as having ceased as from the time of the destruction of the premises. At one time, it rather seemed as though they were going to say that the same ought to apply by reason of the destruction of the installation. Counsel for the defendants did not insist upon that as part of his argument. In the defence to this claim, in para. 3 it is pleaded as follows : G H

It was an express or alternatively an implied condition of the said agreement

and/or the basis of the said agreement that the said premises and/or the said installation should continue to exist during the said agreement.

Then in para. 4 it is pleaded as follows :

Further or alternatively the liability of the defendants to make the said payments to the plaintiffs was conditional upon the plaintiffs maintaining the said installation in good working order.

A Then in para. 6 it is pleaded as follows :

By reason of the premises [*i.e.* the fire], as from the said date the basis of the said agreement no longer existed and/or the further performance of the said agreement became and is impossible and/or the said agreement and/or all the rights and obligations of the plaintiffs and the defendants thereunder ceased to subsist, save that the defendants under cl. 6 of the said agreement became and are liable to

B pay to the plaintiffs the sum of £90 being £15 per instrument. Before the issue of the writ herein the defendants were ready and willing and offered to pay and are still ready and willing to pay the sum of £90 to the plaintiffs, pursuant to cl. 6 of the said agreement.

Then in para. 9 of the defence it is pleaded as follows :

C Alternatively, as from Nov. 8, 1937, the plaintiffs wholly failed to maintain the said installation in good working order and by reason thereof no sum became or is payable to the plaintiffs by the defendants under cl. 2 of the said agreement.

That plea is perhaps putting the matter on a somewhat different basis. I read it as saying : " You, the plaintiffs, have not performed your part of the agreement in keeping the instruments in order. Therefore, we, the

D defendants, are discharged from paying our rent."

In the course of his argument, counsel for the plaintiffs pointed out that there was a duty on the defendants to give notice if anything was wrong with the instruments, and also, under the contract, there was a duty on them to allow the company reasonable access to their premises

E at all times to inspect and repair the installation. He submitted that, in the circumstances of this case, the defendants could not take any advantage of the fact that the plaintiffs had not maintained the installation in good working order, because there had been no notice to them to repair, and, over and above that, the defendants had not allowed the

F plaintiffs access to their premises to put the instruments in order, because in fact they had no premises in which the installation was. I do not think that that plea, in the circumstances of this case, can be of advantage to the defendants. I agree with the argument of counsel for the plaintiffs on that.

G The really serious question for decision is that which was put by counsel for the defendants in this way. He said that the agreement was in reference to certain premises, and that there must be implied in the contract a term that those premises would remain in existence and fit for the presence of the installation. From that, he submitted that,

H once the premises were destroyed by fire, then it must be held that the object of the contract was rendered commercially impracticable, and that thereby the defendants were excused from any further performance under it, except that it was their duty to pay the £15 per instrument—£90 in all—which they were always ready and willing to pay. As against that, counsel for the plaintiffs submitted that there was no reason what-

ever to imply any condition of that kind, and no reason to imply a condition that the instruments were to be at one premises, and at one premises only.

In dealing with this matter, it seems to me that the principle upon which I ought to approach it is this. Where, from the nature of the contract, it appears that the parties must have known, from the beginning, that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing, or some particular state of affairs, existed, or continued to exist, the contract will generally be construed as subject to an implied condition that the parties shall be excused from further performance in case, before breach, the contract becomes impossible from the perishing of the thing or non-existence of the state of affairs, without the default of either party, but this implied term does not operate so as to avoid the contract *ab initio*. This doctrine of frustration rests on an implication arising from the presumed intention of the parties. The presumption must be a necessary one, and not inconsistent with any express term of the contract. The application of the principle depends upon the circumstances of each particular case.

In considering whether or not it is necessary to imply a term into this contract such as counsel for the defendants contends should be implied into it, one must, of course, look at the terms of the contract itself, and at all its provisions. If it becomes necessary, in a business transaction such as this, in order to give business efficacy to the transaction, to imply a clause, then it must be implied. Unless it is necessary so to do, however, one must not read into the contract any term of that kind. It must be remembered, in dealing with a matter of this kind, that it was always open to the parties to add a term to the contract. In cl. 6 of this contract, the parties provided what should be paid by way of value on any one of the instruments if it were destroyed. They had in mind then the possibility of fire causing destruction of the instruments or installation. They do not provide anywhere in the contract that, if that happens, the contract shall be considered as at an end. It is quite true, as the argument for the defendants suggests, that that clause is dealing with the installation, and only with the installation. It is not dealing with the destruction of the premises. Nevertheless, when one looks at the terms of the contract and finds that the commencement of the contract mentions "12, Well Court" and cl. 1 begins by saying "The company agrees to supply, instal and let on hire at the above premises of the subscriber," and when one comes to cl. 8:

The subscriber shall at any time during the continuance of this contract be entitled to have the installation transferred at his expense to any other premises . . . one is bound, as I think, to say that other premises besides 12, Well Court, were in the contemplation of the parties at that time. That is one of the reasons which makes it, I think, impossible to imply into this contract the term which counsel for the defendants would ask me to read into it. I see no reason to imply that term from any matter of business efficacy.

More than that, the fact that the defendants have the right to have the instruments removed seems to me to point to the fact that other premises besides 12, Well Court, were within the contemplation of the parties.

There are other clauses in this agreement to which one could refer, but I do not think that it is necessary to do so. In directing my attention
A to the principle, counsel for the defendants referred me to *Horlock v. Beal* (1), where LORD SHAW OF DUNFERMLINE, quoting from the judgment of BLACKBURN, J., in *Taylor v. Caldwell* (2), at p. 839, said, at p. 512 :

“ In none of these cases is the promise in words other than positive, nor is there
B any express stipulation that the destruction of the person or thing shall excuse the performance ; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.”

In the course of laying down these principles the cases which had occurred in the English courts were referred to, and that of *Williams v. Lloyd* (3) was especially founded on.

It is manifest that the principle last adumbrated was capable of a wider practical
C and logical application than to the failure of a *certum corpus*. The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties.

I have tried to approach this case from the point of view of the words of BLACKBURN, J., at p. 839 :

“ . . . but that excuse is by law implied, because from the nature of the contract
D it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.

I cannot find in this contract that the parties contracted on the basis of the continued existence of a particular person or chattel. In the words
 of LORD SHAW OF DUNFERMLINE, at p. 512 :

The underlying ratio is the failure of something which was at the basis
E of the contract in the mind and intention of the contracting parties.

Nor can I find that in this case. It follows that, in my view, the plaintiffs must succeed.

Something was said at one stage of the case as to possible hardship.
F If there is any, it is well recognised by everyone, and I have nothing to do with it. However, I am not sure that there is really, because the essence of this contract is that the plaintiffs instal their instruments and undertake to leave them there, or wherever they may be (assuming that the defendants
G cause them to be moved to other premises), and that the plaintiffs undertake to maintain them over a period. It may be, for all I know, that the initial installation is costly, and the maintenance is perhaps comparatively little. The agreement between the parties is that the term under which the liabilities on each side shall last is the term of 14 years, and the
H defendants in this case, if they had so desired, could have taken other premises, and could have had the instruments, or other instruments, replaced and erected there, but they wrote to the plaintiffs on Apr. 21, 1938, as follows :

With reference to your application for payment of rent on telephone installation, we are advised that with the total destruction of the premises and the installation, the whole basis of the agreement has gone, i.e., you cannot fulfil your part of the

agreement (by letting us have the installation on hire at the premises 12, Well Court, E.C.4, as required by cl. 1), and you cannot carry out your obligation to maintain the installation for some indefinite and possible lengthy period.

I have dealt with those points. The letter continues as follows :

You have in fact been paid the rental in advance for half-a-quarter more than you are entitled to. At the same time our temporary premises being virtually on two floors, naturally do not require inter-office telephones. A

It is pointed out by counsel for the plaintiffs that the defendants, having obtained other premises, had an option as to whether or not they would have the instruments installed there, they being ready and willing to pay the value under cl. 6 of the agreement. They did not require the instruments at those premises, though, and possibly that was because the premises were not suitable for them, and they had difficulty in getting other premises, I dare say. I think that that point also of counsel for the plaintiffs is sound. The defendants had an option as to whether or not they would have the instruments at other premises. They preferred not to exercise that option, and in that sense they themselves are responsible for the fact that they have not got instruments now. There must be judgment for the plaintiffs for £163 2s. 4d., the amount claimed, as to which there is no dispute. B C

Judgment for the plaintiffs for £163 2s. 4d. with costs. D

Solicitors: *Phoenix, Levinson & Walters* (for the plaintiffs);
Charles G. Bradshaw & Waterson (for the defendants).

[Reported by CHARLES NEWTON, ESQ., Barrister-at-Law.]

SMITH HOGG & CO., LTD. v. BLACK SEA AND BALTIC
GENERAL INSURANCE CO., LTD.

[COURT OF APPEAL (MacKinnon and du Parcq, L.JJ., and Macnaghten, J.),
May 10, 11, 12, 1939.]

A *Shipping—Charterparty—Unseaworthiness—Due diligence—Loss due to act, neglect or default of master—Ship unseaworthy at commencement of voyage—Unskilful loading of bunkers during voyage—Claim for general average.*

B The plaintiffs were the owners of a ship chartered to go to Soroka and load timber and carry it to Garston. The charterparty provided that the shipowner should not be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part, and that the shipowner should not be responsible for loss or damage arising or resulting from any act, neglect or default of the master, mariner, pilot or servants of the shipowner in the navigation or management of the ship. General average was to be settled in London according to the York-Antwerp Rules, 1924, in accordance with English law.

C While the ship was loading at Soroka, she suddenly took a list of 5° to port. The master then stopped loading and proceeded upon his voyage. Before arrival at his port of destination, he ran short of bunkers, and put in to Stornoway to take in some extra coal. When 16 tons of coal had been taken in, the ship heeled over, and, in order to save her from sinking, she was beached, with the result that a good deal of the cargo was lost and some of it was damaged. It was found as a fact that

D the ship was unseaworthy upon leaving Soroka, but the experts agreed that the ship could have been bunkered at Stornoway in such a manner as to have brought her back to the upright and to have allowed her to proceed quite safely to Garston and deliver her cargo. The shipowners claimed general average contribution from those interested in the cargo:—

E **HELD:** the dominant cause of the loss was the unseaworthy condition of the ship, and that unseaworthiness was due to a lack of care on the part of the owners and the master. The owners were, therefore, not entitled to general average contribution.

Decision of BRANSON, J. ([1938] 4 All E.R. 383) reversed.

[**EDITORIAL NOTE.** The Court of Appeal have differed from the judge below on the question whether the loss of cargo was due to the original unseaworthiness of the ship or whether it was due to the unskilful way in which the bunkers were put on board during the course of the voyage. The Court of Appeal have taken the view that there was no *novus actus interveniens*, and that, despite the evidence of experts that the bunkers could have been taken on board in such a manner that the ship could have proceeded on her voyage with safety, the disaster to the ship was directly caused by the instability due to the original unseaworthiness.

G AS TO GENERAL AVERAGE, see HALSBURY, Hailsham Edn., Vol. 30, pp. 593-598, paras. 751-755; and FOR CASES, see DIGEST, Vol. 41, pp. 593-598, Nos. 4169-4241.]

Cases referred to:

- H (1) *Kopitoff v. Wilson* (1876), 1 Q.B.D. 377; 41 Digest 473, 3045; 45 L.J.Q.B. 436; 34 L.T. 677.
- (2) *The Christel Vinnen*, [1924] P. 208; 41 Digest 423, 2654; 93 L.J.P. 138; 132 L.T. 337; *varying* [1924] P. 61.
- (3) *Paterson Steamships, Ltd v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538; Digest Supp.; 103 L.J.P.C. 166; 151 L.T. 549.
- (4) *The Europa*, [1908] P. 84; 41 Digest 480, 3129; 77 L.J.P. 26; 98 L.T. 246.
- (5) *Steel v. State Line S.S. Co.* (1877), 3 App. Cas. 72; 41 Digest 428, 2693; 37 L.T. 333.

- (6) *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.*, [1924] A.C. 100 : 41 Digest 428, 2691 ; 93 L.J.P.C. 49 ; 130 L.T. 481.
- (7) *Reischer v. Borwick*, [1894] 2 Q.B. 548 ; 29 Digest 206, 1650 ; 63 L.J.Q.B. 753 ; 71 L.T. 238.
- (8) *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350 ; 29 Digest 229, 1858 ; 87 L.J.K.B. 395 ; 118 L.T. 120 ; *affg.*, [1917] 1 K.B. 873.

A

APPEAL by the defendants from a decision of BRANSON, J., dated Nov. 8, 1938, and reported [1938] 4 All E.R. 383. The facts are fully set out in the judgment of MACKINNON, L.J.

G. St. Clair Pilcher, K.C., and *Hon. T. G. Roche* for the appellants.

Sir Robert Aske, K.C., and *Cyril T. Miller* for the respondents.

B

Pilcher, K.C. : There was no evidence upon which the judge could find that this damage was caused by any act of negligence on the part of the master in taking in bunkers. The original unseaworthiness was the cause of the damage. In *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.* (3), the case relied upon below, the unseaworthiness would have caused no damage but for an act of negligence of the master. That is not this case. [Counsel referred to *The Europa* (4), *Steel v. State Line S.S. Co.* (5), *The Christel Vinnen* (2), *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.* (6), *Reischer v. Borwick* (7) and *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (8).]

C

D

Aske, K.C. : It is essential in this case to prove, not only unseaworthiness, but also that that unseaworthiness was the cause of the damage. Here it was the act of the master which caused the damage. The test is : Was there a *novus actus interveniens* ? Something was done which turned a safe ship into an unsafe one. That was an act of the master, and that caused the loss. I challenge the finding of the judge that this ship was unseaworthy. The evidence was clear that ships with a deck cargo of timber usually have a list. *The Christel Vinnen* (2) is plainly distinguishable from this case, in that there there was unseaworthiness which continued to cause damage to the cargo. Here no damage was caused by the unseaworthiness. In cases like *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.* (3), also, the original unseaworthiness was operating all the time, and ultimately resulted in the loss of the cargo. [Counsel referred to *Reischer v. Borwick* (7) and *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.* (6).]

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Pilcher, K.C., was not called in reply.

MACKINNON, L.J. : In this case, the plaintiffs are a company owning the steamer *Lilburn*. On July 24, 1935, the plaintiffs entered into a charterparty with a body called Exportles Petrosavodsk as charterers of this vessel, and by that charterparty it is provided that the ship :

H

. . . being tight staunch and strong and in every way fitted for the voyage shall . . . proceed to Soroka [in Russia] and there load . . . a full and complete cargo

of mill-sawn red and/or white firwood deals and/or battens and/or boards and/or ends and/or bundled goods and/or planed boards [and that being so loaded the vessel should] proceed therewith to Garston Docks.

Ordinarily speaking, under a charterparty governed by English law, as this charterparty undoubtedly was, there would, of course, be an absolute warranty of seaworthiness, but that absolute warranty of seaworthiness is made subject to an express provision in this charterparty. The only other clause in the charterparty which is material to this issue is cl. 12, which provides as follows :

The shipowner shall not be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation. The shipowner shall not be responsible for loss or damage arising or resulting from act, neglect, or default of the master, mariner, pilot, or the servants of the shipowner in the navigation or in the management of the ship, any other cause arising without the actual fault or privity of the shipowner, or without the fault or neglect of the agents or servants of the shipowner.

The limitation and qualification of the implied warranty of seaworthiness, by cutting it down to use "due diligence on the part of the shipowner to make the ship seaworthy" are a limitation and qualification more apparent than real, because the exercise of due diligence involves, not merely that the shipowner personally shall exercise due diligence, but also that all his servants and agents shall exercise due diligence, as is pointed out in a note in SCRUTTON ON CHARTERPARTIES, 14th Edn., pp. 110, 111, which says that this variation will not be :

... of much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents ; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g., a defect causing unseaworthiness, but of so latent a nature that due diligence could not have discovered it) are not likely to occur often.

Those being the contractual terms of the charterparty, the remaining material clause is cl. 22, which provides as follows :

General average, if any, shall be settled in London according to the York-Antwerp Rules, 1924, in accordance with English law.

In pursuance of that charterparty, the steamer proceeded to Soroka and there loaded her cargo, including a very high deck load, which was some 12 ft. or more above the level of the deck. At the end of the loading, it became manifest that the vessel's stability was a matter of doubt, because she had already taken a list to starboard of some 5°, and it was in evidence that the captain refused 7 standards of his destined cargo, and refused them in circumstances which, the judge found, showed that he realised that the vessel was in a state of doubtful stability. The vessel left Soroka with that not very serious list. Having regard to her condition, however, she was liable to develop a further list, and that happened. She met with fairly bad weather. Her bunkers were being burned away, and, as they were burned away and burned away

below the centre of gravity, that, of course, in the absence of that weight in the bottom of the ship, increased her liability to be unstable. Moreover, that, perhaps, was further increased by reason of the fact that, when she started, there was no water in the forepeak, although the captain remedied that by filling up the forepeak in the course of the voyage. By reason of the fact that she had started with an insufficient supply of bunkers to take her on her chartered voyage to Garston, the captain had to put into Stornoway in order to get a further supply of bunkers. By that time, the vessel's remaining coal was reduced to about 5 tons, and the weight of coal in the bottom of the ship, therefore, had been very seriously diminished. Unwisely, as I suppose it is now realised, when entering the harbour at Stornoway, the captain pumped out the forepeak, which put her down by the head, and that made it more difficult to steer her. However, in that condition she got into the harbour at Stornoway, and was moored with her port side alongside a coal hulk, when the process of taking in bunkers began. The master and the officers thought that it was not desirable to let the coal fall down on the starboard side, where she was already depressed. They thought it was desirable to put the coal on the port side, and they rigged up some planks to direct the coal, which had been dropped down the coal hatch, towards the port side, which was the side of the ship which was up in the air, so to speak.

It appears from the evidence of the experts who were called that in fact that was a great error, and that, contrary to the belief which one of them said would be entertained by any layman, the proper method would have been to have put the coal on the starboard side. However that may be, when some 16 tons had been put on board, the ship rose first to a level keel—that is to say, upright—and then took a most disastrous list over to port. Her port side went so low that water came over the top of openings, ports and, I think, even the hatch coamings, with the result that, had it not been for the fact that she was full of timber and could not sink, she would have gone to the bottom. She remained there, lying on her beam ends on the port side, with, of course, the deck load straining over towards the hulk. The result of that was that expensive measures had to be taken to remove the deck cargo, rescue such of that cargo as had got loose, pump out the water which had got into her to get her up on a level keel, reload the deck cargo, and finish the voyage. That was all work, and expensive work, which would appear to be a godsend to the firm of average adjusters employed by the shipowners. As a result of that, when the ship got to Garston, it was found necessary for the shipowners to have an average guarantee. That was executed on Sept. 24, 1935, by the present defendants, the underwriters of the cargo—an obviously convenient business arrangement, they being liable to indemnify the cargo owners against what they would have to pay under the average statement. Instead of getting the undertaking in the name of the cargo owners, it was taken directly in

the name of the insurance company. That average guarantee of Sept. 24, 1935, is in the following terms :

A In consideration of the delivery of the undermentioned cargo to the consignees thereof against signature of Lloyd's average bond without payment of a deposit, we hereby guarantee to the captain and/or the owners and/or Messrs. Manley Hopkins, Son & Cookes the average adjusters, the payment of any contribution to general average and/or salvage and/or special charges which may hereafter be ascertained to be properly due in respect of the said cargo.

B The present claim is made by the shipowners under that guarantee for the contribution due from the cargo according to the average adjustment set out by Messrs. Manley Hopkins, Son & Cookes in that average guarantee. Neither the judge below nor we in this court have been troubled with the figures as to that, or as to any question of amount. It is only "liability" with which he was, and we are, concerned. If the cargo owners could establish that this disaster was due to a breach of the charterparty, they would be able to say that they were not liable to pay general average contribution, and they could counterclaim against the shipowner for loss or damage to cargo involved by the disaster. Technically, of course, that claim could only be made against the shipowners by the cargo owners, since they alone had any contract with them. However, as the defendants were liable to indemnify the cargo owners, it was arranged, again very conveniently, that they should be allowed to put in a counterclaim in the present proceedings for the amount which the cargo owners, as counterclaimants, would have been entitled to recover from the plaintiffs, and in respect of which the defendants were liable to indemnify them. That is how the matter came before BRANSON, J., and how it comes before this court.

E Those being the facts, the case was heard by BRANSON, J., who delivered a careful judgment, with the greater part of which I entirely agree. The judge sets out the first question for his decision as follows, at p. 385 :

F That being the state of affairs, the first question which arises for decision is whether the ship was, as the defendants allege, unseaworthy when she left the port of Soroka.

He answers that question summarily by saying, at p. 385 :

G I have come to the conclusion that the ship was unseaworthy when she left the port of Soroka . . .

H Then he goes into the evidence about that in considerable detail, but I do not think I need follow him through that evidence, except to say that I entirely agree with his various criticisms upon the evidence which was given before him, and I entirely agree with his conclusions, at p. 386 :

For these reasons, I have come to the conclusion that, when she left Soroka, the ship was not fit to face the ordinary perils of the sea upon her intended voyage from the White Sea to Garston.

Then he says that that unfitness consisted in her being so loaded that she was unstable and liable to heel over and capsize, in so far as a ship

fully laden with timber can capsize. That is the judge's answer to the first question, and I agree with it. Then he says, at p. 387 :

The next question which then arises is whether or not there was due diligence displayed by the owners or the master in order to make the ship seaworthy.

Here again he discusses this question, and here again I need not follow him into a consideration of the details of the evidence. I agree with his answer, and for the reasons he gives. His answer is as follows, at p. 388 :

The result is that I find that no due diligence was used, and, therefore, that there was a want of due diligence in both the owners and the master of this ship.

Those two questions having been disposed of, there remained the third question, and, having up to that point decided both questions in favour of the defendants, on the final question the judge took a sudden list, and went right over in the other direction. The third question, though he does not set it out in terms, was this : Was the disaster, and the consequent expense and loss which resulted from the disaster, which happened at Stornoway caused by the unseaworthiness which he found ? He says that it was not. He puts it in this way, at p. 388 :

The difficulty that I have in arriving at the conclusion that the unseaworthiness was the cause of the loss arises from what happened at Stornoway. If nothing which anybody could have done when the ship had got to Stornoway could have enabled that ship to have sufficient bunkers put on board to continue her voyage to Garston, then I think that the *nexus* between the unseaworthiness at Soroka and the accident at Stornoway would have been complete. However, neither side has been able to say that this ship could not have been bunkered at Stornoway, and bunkered in such a manner as to have brought her back to the upright and to have allowed her to proceed quite safely and deliver the cargo at Garston. Both the experts agree that this could have been done. True, they do not see quite eye to eye as to the manner in which they would have performed the operation, but that sufficient coal to take the ship to Garston could have been put on board the Lilburn was admitted by both Dr. Telfer and Mr. Flannery. That being so, how can it be said that the fact that she sailed unseaworthy from Soroka caused the disaster which happened at Stornoway ?

That seems to me to be a conclusion that, although the ship was unseaworthy at Stornoway, in the sense that she was unstable, and that she undoubtedly capsized at Stornoway, as far as it was possible for her to do so, by reason of her lack of stability, he must hold that the disaster was not caused by that lack of stability, but was due to the fault or neglect of the master in his method of loading the coals at Stornoway. That is the part of the judge's judgment with which I am unable to agree. I think that the cause of the disaster at Stornoway was quite clearly the unstable condition of the ship, the unstable condition in which she had sailed from Soroka, which, so far from being remedied, had naturally got worse through the inevitable incidents of the voyage and the using up of her bunkers. All that can be said about the master was that it was perhaps his act or, possibly, his default, in not doing something to prevent the disaster. None the less, if he had been ideally wise, and as skilled as Dr. Telfer, he might have prevented the disaster by doing something, or by doing differently something which he actually did do. I think that the cause of the disaster was the instability of the ship—that condition in respect of which she had been unseaworthy from the beginning. I think that

that is the proper conclusion, and it may be illustrated by one or two analogous possibilities. I have said that the master in the course of the voyage filled the forepeak to increase the vessel's stability, and, when he was entering the harbour at Stornoway, emptied the forepeak, thereby, no doubt, increasing her liability to capsize. I suggested

- A counsel for the respondents: "Supposing, after that, and before she got to the harbour, by reason of that act of the master in pumping out the forepeak, she had capsized and gone over, could you then have said that that was not caused by her lack of stability due to the manner in which she was loaded at Soroka, and could you say that it was caused, and
- B effectively caused, by the act of the master alone?" I understood counsel for the respondents to say that he would not say that, because that was a different case. I think that it is exactly the same case. It seems to me to be no different from the act of the master in pumping out the forepeak, or his act in putting coals into the bunkers, as he did.
- C Then there is another test one might apply. This ship was unseaworthy in another respect when she sailed from Soroka for Garston. In order to be seaworthy, she ought to have been supplied with sufficient bunker coals to take her to Garston. There was no evidence that it had been arranged that the voyage should be carried on in stages for the purpose of
- D bunkering her. As a matter of fact, she left Soroka with only 154 tons of bunkers on board, although to get to Garston she would need at least 182 tons, and, therefore, would want a considerable margin beyond the 154 tons she had on board. If the captain had not put in to Stornoway, and had carried on in order to get to some port in Scotland, and had
- E found he had used up his bunkers and had had to burn his cargo, and the shipowner claimed that the burning of cargo was a general average sacrifice and the cargo owners claimed for the loss of their cargo by reason of its being burned, could it then be said that the destruction of the cargo by burning it was not due to the fact that the ship had been
- F in an unseaworthy condition, having insufficient bunkers on board, but was due to the act or neglect of the captain in not putting into Stornoway, as he could have done, to get further supplies? I think that it would be impossible to say that the burning of the cargo would not be the consequence of the fact that she left Soroka unseaworthy,
- G having insufficient bunkers. It was with much point suggested by DU PARCQ, L.J., in order to test this question in the light of what would have been the procedure in the old days before 1854, when such a case as this had been decided by a jury, that we should ask ourselves what would be the question proper to be put to the jury in such a case, and
- H counsel for the appellants was able to draw our attention to *Kopitoff v. Wilson* (1), a case somewhat similar to this about unseaworthy stowage. In that case, the issues of fact were decided by a jury, and the questions left to the jury there, and approved by the Court of Appeal, were as follow, at pp. 379, 380 :

Was the vessel at the time of her sailing in a state, as regards the stowing and

receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstätt?

Second. If she was not in a fit state, was the loss that happened caused by that unfitness? These questions were put in writing and handed to the jury, and on that paper the judge put in writing what he had previously stated in his summing-up, that they were "to understand (in answering this second question) that though the disaster would not have happened had there not been considerable sea, yet it is to be considered as caused by the unfitness, if they (the jury) think that the plates would not have got adrift when they did had the stowage been such as to put the ship in a fit state."

Applying that to this case, the questions for the jury here would be, (i) was the vessel, on sailing from Soroka, reasonably fit, as regards her stowage and stability, for the voyage? and (ii) if she was not so fit, and, therefore, was unstable, was the loss which happened caused by that unfitness? To that would be appended this rider, or explanation to the jury: "Although the disaster at Stornoway would not have happened but for the fact that coals were being loaded with the forepeak pumped out, yet it is to be considered as caused by the unfitness if you think that the vessel would not have capsized had she sailed in a fit state from Soroka." I think that that is the proper test, having regard to the circumstances of this case. The judge has answered the first question in favour of the defendants, and I think that he ought to have answered the second question also in favour of the defendants. In short, with great respect to the judge, who gave a very careful judgment, I think that he fell into the same sort of error as that into which HILL, J., another very experienced judge, fell in *The Christel Vinnen* (2). That was a case of unseaworthiness. In that case, there was a leak through a defective rivet in the hull of the ship, and the cargo was damaged by reason of water getting in. The progress of the damage might have been stopped if the captain had been careful and had pumped out the bilges, but he did not do that, and that, of course, was the reason why the damage to the cargo attained the dimensions it did. In that case, the Court of Appeal held as follows, at p. 208:

... although the damage to the cargo was increased by the negligent failure to pump, the dominant cause of the damage was the unseaworthiness. It followed, therefore, that the shipowner was responsible for the whole of the damage and not only (as held by HILL, J.) for the proportion of the damage done before the time when but for the negligence the inflow of water would have been checked.

Disagreeing with that part of the judgment of BRANSON, J., and agreeing as I do with the earlier part of it, I think that the result is that there should be judgment for the defendants on the claim, and on the counterclaim, with costs here and below. We are not concerned here with any question as to amount.

DU PARCQ, L.J.: I agree, and I only desire to add a few words because we are differing from the judge's very careful judgment. It is a striking fact that, so far as the findings of fact in the judgment of BRANSON, J., are concerned, I think that we do not disagree with them at all. It is only as to the inference of law which the judge draws from those

facts that I find it impossible to come to the same conclusion as that to which he came. I should have thought, but for the fact that it has been argued by counsel for the respondents, that there can be no doubt at all that, where a ship is in an unseaworthy condition, and where, if she had not been in an unseaworthy condition, there would have been no loss,

A even if there is no negligent act or omission on the part of the master or other persons named, the shipowners must, under this charterparty, be liable. Counsel for the respondents said a good deal about *novus actus interveniens*, and I understood him at one time to say that, if there was any act, although it was not a negligent act, but a perfectly proper act,

B on the part of the master which was the immediate cause of the loss which happened, then the shipowner was protected by the exceptions clause. It seems to me quite impossible to maintain that. Of course, if the ship is not unseaworthy, I can understand that the shipowners are not to be liable if loss is caused by an act, although it may be a proper act, on the

C part of the master, but, where the ship is unseaworthy, and all that the master does is to do an act which would be a perfectly proper one if the ship were seaworthy—as, for instance, to take a case with which one of the decisions cited provides us, if he puts the ship about suddenly, having no reason to think it is not perfectly safe to do so—it is,

D in my view, quite impossible to say that what he does is the cause of the loss. No jury could be persuaded, I am sure, that the captain's perfectly proper conduct was the cause of the loss, and to talk about *novus actus interveniens* in such a case, with respect to the argument of counsel for the respondents, is only to confuse the issue. I can quite

E understand that difficult cases may arise where there is a clearly negligent act on the part of the master, coupled with unseaworthiness on the part of the ship, and where, if one were asked whether this loss was caused by the unseaworthiness of the ship or by the negligent act of the master, one's first inclination would be to say that it was caused by both. I

F think that cases of that sort may make it very difficult to answer the question of fact, which appears to be a proper question of fact to put in such cases. In my view, however, we are not faced here with one of that difficult class of cases at all. As I understand the findings of the judge, which I accept, it is not quite correct to say that he found that

G the master was negligent. The judge deals with the matter in only three parts of the judgment to which I wish to refer. First of all, he says that the ship was in such a tender and unstable state at Stornoway that [p. 386]:

... she could not put on board 16 tons of bunkers in a very ordinary way without going over on to her beam ends.

H

That does not look like a suggestion of negligence against the master. Then, in a passage which has been read many times, the judge puts the question to himself in this way, at p. 388:

If nothing which anybody could have done when the ship had got to Stornoway could have enabled that ship to have sufficient bunkers put on board to continue

her voyage to Garston, then I think that the *nexus* between the unseaworthiness at Soroka and the accident at Stornoway would have been complete.

Then the judge goes on to say that it was clear, if one accepted the evidence of Dr. Telfer, or if one accepted the evidence of Mr. Flannery, that it would have been possible for a skilled person with an exceptional degree of scientific knowledge to get this coal on board without disaster. A That does not seem to me to be a finding of negligence against the master, who had not the advantage of the advice of either Dr. Telfer or Mr. Flannery when he was considering what he ought to do. He did what appears to have been not an extraordinary thing at all. Then finally the judge refers to the act of the master as wrong in the circumstances. B I understand that to mean the circumstances including the fact that the ship was unseaworthy—the result of the ship being unseaworthy, or the fact that the master's task was made much more difficult than it would have been if she had been seaworthy. In those circumstances, he did not do the wisest thing possible, and, as I have said, a master C with scientific knowledge of an exceptional kind might have succeeded in putting this coal on board without causing the ship to capsize. On that finding, it seems to me that the only possible answer to the question as to the cause of the loss is that it was the unseaworthiness of the ship, and not this perfectly excusable conduct on the part of the master. D

I would add that the shipowners are bound under this charterparty to use due diligence to provide a seaworthy ship, and, if they fail to do so, they ought not to be encouraged to say: "The master is making the best of a bad job, and must do his best with an unseaworthy ship, and, if he does not make the best of a bad job, and does not use this unseaworthy ship with such a degree of skill and with such care that we come out of it as well as if she were a seaworthy ship, then we are to be excused." I do not think that that is the right construction of this exceptions clause, and I agree with MacKinnon, L.J., in saying that this appeal must be allowed. E F

MACNAGHTEN, J. : I agree, and have nothing to add.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellants); *Sinclair, Roche & Temperley*, agents for *Temperley, Tilly & Hayward*, G West Hartlepool (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

Re FRAME, EDWARDS v. TAYLOR.

[CHANCERY DIVISION (Simonds, J.), April 19, 1939.]

Wills—Construction—Condition or trust—Adoption of testator's daughter—Failure to obtain adoption order—Whether failure of gift for non-compliance with condition—Trust for maintenance.

A The testator by his will bequeathed to a legatee therein specified "all my money and insurance policies . . . on condition that she adopts my daughter Alma Edwards and also gives to my daughters Jessie Edwards and May Alice Edwards the sum of £5 each and a like sum of £5 to my son Alexander Edwards." The legatee applied for, but was unable to obtain, an adoption order:—

B HELD: the word "condition" here was not used in its strict legal sense. The bequest to the legatee was one on trust that she did certain things, so as to establish the relationship of parent and child between her and the testator's daughter. It included, not only parental duties of care, advice, and affection, but also the duty of maintenance. As it involved the duty of maintenance, it was a trust which the court could enforce.

C **[EDITORIAL NOTE.]** A gift upon condition that the donee makes certain payments has generally been construed as one creating a charge upon the property given, or as one creating a trust to be performed by the donee. In so far as such a trust merely involves the payment of money, it can be enforced by the court, and here it is held that, upon consideration of the whole will, such enforcement is not prevented by the fact that adoption of a child also involves the idea of bestowing certain care and attention upon that child.

D AS TO CREATION OF TRUST OR CHARGE BY WILL, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 792, 793, para. 1442; and FOR CASES, see DIGEST, Vol. 44, p. 439, Nos. 2652-2656.]

Cases referred to:

- E (1) *Roundel v. Curren* (1786), 2 Bro. C.C. 67; 44 Digest 480, 2983.
 (2) *Robinson v. Wheelwright* (1856), 6 De G.M. & G. 535; 20 Digest 426, 1558; 25 L.J.Ch. 385; 27 L.T.O.S. 73.
 (3) *Croskery v. Ritchie*, [1901] 1 I.R. 437; 44 Digest 442, case a.
 F (4) *Re Kirk, Kirk v. Kirk* (1882), 21 Ch.D. 431; 44 Digest 481, 2986; 47 L.T. 36.
 (5) *Broad v. Bevan* (1823), 1 Russ. 511, n.

G ADJOURNED SUMMONS to determine the validity of a condition in the will of the testator, whereby a gift of certain money and insurance policies was made conditional upon the donee adopting the testator's daughter and also upon payment of £5 to each of the three other children of the testator. The donee had duly applied to the county court for an adoption order under the Adoption of Children Act, 1926, but, the matter being opposed by the child to be adopted and some of her brothers and sisters, the order was refused. The reason for such opposition
 H was that the donee was the licensee of a public-house, and the child objected to living there.

R. W. Goff for the plaintiff.

E. Milner Holland for the defendant, Mrs. Ada Taylor.

G. P. Slade, K.C., and Peter Miller for the infant defendant, Alma Edwards.

Goff : This is a condition precedent, and not a condition subsequent. The gift fails notwithstanding the fact that it may have been impossible of performance. [Counsel referred to *THEOBALD ON WILLS*, 8th Edn., p. 638.] The first defendant has not provided a home for the second defendant, nor has she contributed anything to her maintenance except a sum for pocket-money. There must be either a legal adoption or a *de facto* one. Alternatively, if it is a condition subsequent, the gift fails, as the defendant has not done everything she might have done. If she cannot adopt *de jure*, she might have adopted *de facto*. [Counsel referred to *Roundel v. Curren* (1) and *Robinson v. Wheelwright* (2).] A B

Milner Holland : Adoption involves the assumption of the obligation to maintain as well as the relationship of parent and child. Any condition involving the performance of a continuous series of obligations cannot be a condition precedent. An order of the court permitting adoption was not what was intended by the testator, although, if this were so, the condition here might be a condition precedent. The executrix must show either that she has performed the condition or that, through no fault of her own, it has become impossible to do so. She has done her best to adopt the child, and her efforts have failed. It takes two to make an adoption, and the other party will not consent to this course. The obligation here is a continuing one. The testator is trying to secure for the child something in the nature of care and maintenance until she shall attain the age of 21. [Counsel referred to *Croskery v. Ritchie* (3) and to *JARMAN ON WILLS*, 7th Edn., Vol. 2, pp. 1455, 1457.] C D E

Slade, K.C. : This condition, although expressed as such in the will, is in fact an enforceable trust for the benefit of the infant. The whole of the conditions in the will form one group, provision for the adult children and also for the infant daughter. Adoption must be a continuing obligation, Mrs. Taylor here treating the child as her own, and, *vice versa*, the child regarding Mrs. Taylor as her mother. This is quite plainly a condition for the benefit of the infant, and one to which the court can give effect. [Counsel referred to *Re Kirk, Kirk v. Kirk* (4), *Broad v. Bevan* (5) and *JARMAN ON WILLS*, 7th Edn., Vol. 2, p. 1435.] F G

Goff, in reply : The testator here gave the donee the property for her own benefit, provided that she did something which he wanted done.

SIMONDS, J. : This case raises rather an interesting point. The testator, Albert Edward Frame, died on Oct. 18, 1937, having made his will on Feb. 25, 1935. The testator was, at the time of his death, the licensee of a public-house in Victoria Dock Road, Canning Town. By his will, he revoked all previous wills made by him. He appointed H

Mrs. Ada Taylor, the first defendant in these proceedings, to be the executrix, and directed that :

. . . all debts and testamentary expenses be paid as soon as may be convenient after my death.

Then he used the following words :

- A I give and bequeath unto the said Mrs. Ada Taylor all my money and insurance policies . . . on condition that she adopts my daughter Alma Edwards and also gives to my daughters Jessie Edwards and May Alice Edwards the sum of £5 each and a like sum of £5 to my son Alexander Edwards.
- B The question is what those words mean. I have listened to an able and interesting argument on these questions—whether the condition is a condition subsequent or a condition precedent ; whether, if it be a condition precedent, the condition has become impossible of performance, and, if so, whether the gift fails ; whether, if it be a condition subsequent, the donee has failed, through no fault of her own, to comply with the condition ; and whether, in that event, the gift has failed.
- C As I listened to that argument, it impressed itself more and more on me that, after all, this was not a condition at all, for, in my view, on the true construction of this clause, the word “ condition ” is not used in its strict legal sense. It is a gift to Mrs. Taylor on condition, in the sense of on the terms, or on the trust, that she does certain things, and that, I think, becomes clearer when it is realised that the condition relates, not only to the adoption of one daughter, but also to the payment of certain sums to other daughters. A devise, or bequest, on condition that the devisee or legatee makes certain payments does not import a condition in the strict sense of the word, but imports a trust, so that, though the devisee or legatee dies before the testator, and the gift does not take effect, yet the payments must be made, for it is a trust, and no trust fails for want of trustees. When I come to look at the condition, it seems clear that what the testator intended was that Mrs. Taylor should receive certain moneys provided that she performed certain acts. Much argument has been directed to what is involved in the condition that “ she adopts my daughter.” It seems clear that, whether or not an adoption under the authority of an order made under the Adoption of Children Act, 1926, is necessary, what is intended is not any single formal act, but a series of acts to establish as between Mrs. Taylor and the testator’s daughter the relationship of parent and child. In a word, Mrs. Taylor is to treat the child as if she were her daughter, because that is what adoption means. Is that a trust which the court can enforce ? It includes, not only the parental duties of care, advice, and affection, but also the duty of maintenance. So far as adoption involves the giving of care, advice and affection, this court cannot compel that such things be given. However, seeing that it involves the duty of maintenance, that is a trust which the court can enforce,
- H

directing, if necessary, an inquiry in that regard. It will not allow the whole trust to fail because in part it cannot be enforced.

Therefore, I come to the conclusion that the gift to Mrs. Taylor of all the money and insurance policies—what that means will have to be considered—on condition “that she adopts my daughter” involves that she shall receive those things, whatever they may be, on trust A to make proper provision for the maintenance of the child as her adopted daughter, and that is a trust which can be enforced, and, if necessary, an inquiry can be directed in that regard.

Solicitors: *H. N. Robbins* (for the plaintiff); *Francis E. Ellis* (for the defendant Mrs. Ada Taylor); *J. C. L. Sharman* (for the infant B dependant Alma Edwards).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

WILSON v. MITCHELL.

[KING'S BENCH DIVISION (Finlay, L.J., sitting as an additional judge),
April 3, May 5, 1939.]

A *Guarantee—Co-sureties—Action for contribution—Counterclaim in respect of damages recoverable if at all by principal debtor against creditor—Availability of counterclaim.*

B In 1932, B. & Co. transferred a tractor to M.F.I. Co., who hired it to M. & Co. under a hire-purchase agreement. The present plaintiff and defendant were joint guarantors to this agreement. In Jan., 1933, M. & Co. went into liquidation, and in Mar., 1933, M.F.I. CO. assigned all their rights under the agreement to B. & Co., who sued the guarantors. The present defendant set up a counterclaim for breach of warranty, but, after negotiation, the present plaintiff submitted to judgment. In the present action, he claimed contribution from the defendant as a joint guarantor of the agreement. The defendant contended that, as he had a defence in the previous action, that defence should still be available to him in the present action :—

C **HELD :** a counterclaim for damages could not be prayed in aid by the co-surety in this action. In any event, this could not be done without bringing in the principal, whose claim it really was.

D **[EDITORIAL NOTE.** In the ordinary way, a surety, when sued under his guarantee, may raise a set-off or counterclaim against the creditor. The particular case which is here considered is where the counterclaim is one for damages not directly recoverable by the surety, but recoverable only by the principal debtor. There is the further complication that the claim was not made when the co-sureties were sued by the creditor, but is sought to be set up in an action between the co-sureties for contribution. While such a cross-claim might be set up by joining the principal debtor in the action by the creditor, it cannot be set up as between the co-sureties.

E **AS TO SET-OFF OR COUNTERCLAIM BY SURETY,** see HALSBURY, Hailsham Edn., Vol. 16, pp. 85, 86, para. 89; and **FOR CASES,** see DIGEST, Vol. 26, p. 104, Nos. 718-720.]

Cases referred to :

- F** (1) *Eshelby v. Federated European Bank, Ltd.*, [1932] 1 K.B. 423; Digest Supp.; 101 L.J.K.B. 245; 146 L.T. 336; *affg.*, [1932] 1 K.B. 254.
- (2) *Gillespie v. Torrance* (1862), 25 N.Y. 306.
- (3) *Newton v. Lee* (1893), 139 N.Y. 332.
- (4) *Bankes v. Jarvis*, [1903] 1 K.B. 549; 40 Digest 420, 416; 72 L.J.K.B. 267; 88 L.T. 20.
- (5) *Wheatley v. Bastow* (1855), 7 De G. M. & G. 261; 26 Digest 191, 1479; 24 L.J.Ch. 727; 25 L.T.O.S. 191.
- G** (6) *Smith v. Compton* (1832), 3 B. & Ad. 407; 26 Digest 237, 1844; 1 L.J.K.B. 146.

ACTION for contribution by a surety under a guarantee against his co-surety. The facts of the case are fully set out in the judgment.

Gilbert J. Paull, K.C., for the plaintiff.

H *J. F. F. Platts Mills* for the defendant.

Platts Mills : The assignment of the guarantee is subject to the equity of the set-off. [Counsel referred to *Bankes v. Jarvis* (4) and ROWLATT ON PRINCIPAL AND SURETY, 3rd Edn., p. 111.]

Paull, K.C. : The plaintiff had no defence to the earlier action, and therefore the defendant had no defence, and so he is liable to contribute. No warranty was given in regard to the tractor. The rights of an assignee are laid down in *Wheatley v. Bastow* (5). [Counsel referred to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 16, p. 84.] A set-off may be a defence, but a counterclaim never can be. There was no possible set-off here. [Counsel referred to R.S.C., Ord. 19, r. 3, and R.S.C., Ord. 21, r. 15.] A set-off must be for a liquidated amount. In *Bankes v. Jarvis* (4), the amounts set off could be stated at the time of the pleadings, and so were liquidated amounts. In *Smith v. Compton* (6), a party had compromised an action, but here the plaintiff had no defence to the earlier action, and so could not compromise.

FINLAY, L.J. : This case does not involve any large sum of money (the claim is, I think, less than £200), but it raises a point which I think is one of some little difficulty. The way the matter arises is this. The action is brought by the plaintiff, and his claim is one for contribution against the defendant under a guarantee. The substantial case which he sets up is this. He says that he and the defendant jointly became sureties for a company called D. W. Mitchell & Co., Ltd., and that he was sued on his guarantee and had to pay, and he now claims contribution from the defendant. He claims it, I may say, after a very long time—I think about 5 years—but he explains that by saying that he was not aware until the other day that there had been an improvement in the defendant's circumstances so that the defendant is now in a position to pay.

The matter stands in this way. On May 26, 1932, there was a hire-purchase agreement between a company called Mutual Finance Indemnity Co., Ltd., and D. W. Mitchell & Co., Ltd. That was in a very common form, and the only matter, I think, material to mention is that there was an express term in it to the effect that there was to be no condition or warranty whatsoever that the motor car or any accessory thereto was roadworthy, or otherwise as to its quality, state, condition or fitness for any purpose. In fact, the machine was supplied by a firm called E. Boydell & Co., Ltd., and the familiar transaction went through. Boydell transferred the machine to the hire-purchase finance company, who in turn hired it to D. W. Mitchell & Co., Ltd. In the company D. W. Mitchell & Co., Ltd., both the plaintiff and the defendant were concerned, the plaintiff apparently supplying money and the defendant supplying brains. I ought to mention that, the plaintiff and the defendant being concerned in the company, it was not unnatural that a guarantee should be insisted upon, and that the plaintiff and defendant should be willing to enter into a guarantee that the hirers' obligation should be fulfilled. Accordingly, by a document dated June 8, 1932, it was provided that,

in consideration of the Mutual Finance Indemnity Co., Ltd., hiring the vehicle to D. W. Mitchell & Co., Ltd., the plaintiff and the defendant guaranteed payment and performance by the hirer of his obligations.

D. W. Mitchell & Co., Ltd., had a rather short and chequered career. I was told, and of course I accepted it, that a great deal of business
A was done. They were carrying out contracts for public departments and municipalities and so forth. For some reason, however, they came to grief, and in Jan., 1933, they went into liquidation. On Mar. 21, 1933, there was an assignment of all rights under the hire-purchase agreement by the Mutual Finance Indemnity Co., Ltd., to E. Boydell & Co., Ltd., the
B latter being, as I have mentioned, the people who had in fact supplied the machine, which was a Fordson tractor and accessories. Notice of assignment was duly given. Shortly after that, on Apr. 21, 1933, a writ was issued by Boydell & Co., Ltd., against the plaintiff and the defendant. A defence was put in by Mitchell, the present defendant,
C in which in effect he set up a counterclaim for breach of warranty, and somewhat elaborate complaints were made as to the machine and its accessories being inadequate for the work to be done. There was a good deal of correspondence between the various parties and the solicitors for the plaintiffs, Boydell & Co., and the liquidator of D. W. Mitchell
D & Co., Ltd., and ultimately Wilson, the present plaintiff, submitted to judgment, apparently without any consultation with his co-defendant, Mitchell. Thereupon the proceedings against Mitchell were stayed. It appears that at that time Mitchell had no money, and his view is set out in a letter in which he said he had no money or employment,
E but that he had a sound defence which had not been heard.

After this longish period, this action is brought. The position, as I see it, is this. There was, I think, no set-off at all, but what is said is that there was a counterclaim or a cross-claim which was available—available anyhow to the principal—and I think that it is quite possible
F that, if that matter had been pressed, some sort of arrangement might have been arrived at, and the debt guaranteed might have been reduced. The question, which I think is not entirely free from difficulty, is whether or not this affords any defence to the present claim. It is necessary to appreciate exactly the facts. I have already stated them. I can
G summarise them concisely. They are these. Boydell & Co. supplied this machine to the Mutual Finance Indemnity Co., Ltd. The Mutual Finance Indemnity Co., Ltd., hired it to D. W. Mitchell & Co., and the guarantee was given. The Mutual Finance Indemnity Co., Ltd., assigned to Boydell's, and Boydell's then sued on the hire-purchase
H agreement. It is quite plain, as I say, that there was no defence, and the cross-claim, if any, was against Boydell's, not as owners, but because they had, so it is said, supplied a machine which was defective. It is obvious that, as between them and the company, the principals,

or the sureties, there was no contractual relation. They sued purely because they were the assignees of the hire-purchase agreement.

Several cases were referred to. Such cases as *Eshelby v. Federated European Bank, Ltd.* (1) do not seem to me to help. That case, I think, decides only the proposition—which, when it is stated, certainly seems somewhat elementary—that, if there is a guarantee for payment in respect of work done, the liability for the payment does not arise if the work is not done. What I have to consider here is, as I have said, whether or not the facts which I have stated (and I have certainly stated them not unfavourably to the defendant) afford an answer here. I have stated them not unfavourably to the defendant for the reason that I have, I confess, considerable sympathy with him, being sued after this very long period in respect of this claim. Nevertheless, I have arrived at the conclusion that, on the materials which are before me now—I say that advisedly because I am told that there may be another point—it is impossible to say that the defendant has disclosed an answer. The only cross-claim was a claim for damages, and, as such, it seems to me impossible to say that it could be prayed in aid by a surety as against the claim on the guarantee. If, contrary to my view, it could be prayed in aid by the surety, then certainly it could not be prayed in aid without bringing in the principal whose claim it really was. This matter is discussed with some fulness in ROWLATT ON PRINCIPAL AND SURETY, 3rd Edn., p. 139, and two American cases, *Gillespie v. Torrance* (2) and *Newton v. Lee* (3), which the author cites, appear to me to support his proposition, and to support the judgment which I now give. That judgment, therefore, must be in favour of the plaintiff.

Solicitors: *Humphrey Razzall & Co.* (for the plaintiff); *James R. White & Co.* (for the defendant).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]



